(1) Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

HOWARD MITCHELL MCCAIN, JR.,

Petitioner,

v.

THE CITY OF LAFAYETTE, KENNETH BOWEN, AROS MOUTON AND JOHN R. RAINES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

R. SCOTT ILES
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5788

QUESTIONS PRESENTED

(1) Whether the Louisiana Appellate Court erred in its evaluation of whether Howard McCain's "legitimate reason for dismissal was a pretext" pursuant to this Honorable Court's analysis in O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S.2d 308, 116 S.Ct. 1307 (1996).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

PROCEDURAL HISTORY 2

FACTUAL HISTORY 14

REASONS FOR GRANTING THE WRIT 24

CONCLUSION 25

INDEX TO APPENDICES

APPENDIX A DECISION OF SUPREME COURT OF LOUISIANA DENYING REVIEW . . 1a

APPENDIX B DECISION OF THIRD CIRCUIT COURT OF APPEAL 2a

APPENDIX C DECISION OF FIFTEENTH JUDICIAL DISTRICT COURT . . . 27a

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 25

Celetex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 25

Matsushita Electric Industrial Company v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 25

O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S.2d 308, 116 S.Ct. 1307 (1996) . . . . . i, 24

Stultz v. Conoco, 76 F.3d 651 (5th Cir., 1996) 3

STATUTES AND RULES

29 USCA Section 621, et seq. 1

OTHER

Age Discrimination in Employment Act of 1967 1

United Constitution, Fourteenth Amendment 1

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana to review the merits appears at Appendix A to the petition and is has been designated for publication but is not yet reported; The opinion of the Third Circuit Court of Appeal appears at Appendix B to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the Supreme Court of Louisiana decided my case was September 17, 1999. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is a federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Age Discrimination in Employment Act of 1967

(2) 29 USCA Section 621, et seq.

(3) United Constitution, Fourteenth Amendment

STATEMENT OF THE CASE

The procedural history of this matter will be set out separately from the factual history.

PROCEDURAL HISTORY

Howard McCain filed a Petition for Damages under the Age Discrimination in Employment Act and under the Louisiana Age Discrimination in Employment Act on August 25, 1995, complaining that his employment with the City of Lafayette from 1978 until 1995 was terminated within a few short months of retirement, thus costing him tens of thousands of dollars of benefits, and complaining that the motivating factor behind his termination was his age.

Originally, the district court scheduled Mr. McCain's trial for November 12, 1997. However, the defendants filed a Motion to Continue the trial on September 15, 1997, and the Court granted the motion.

Howard McCain again moved to fix this matter for trial in April, 1998. The Court did so setting the case for a bench trial on November 10, 1998 at 10:00 a.m.

The Court directed the parties to file any dispositive motions before June 15, 1998. However, as that deadline approached, the defendants sought a thirty day extension to file any dispositive motions, and this request for an extension was granted. The defendants were given until July 15, 1998 to file any dispositive motions.

On the day before the deadline, the defendants filed a Motion for Summary Judgment noting "...that plaintiff will be

unable to satisfy his evidentiary burden at trial", but filed no supporting evidence or legal memorandum.

Pursuant to the Local Rules of Court for the Fifteenth Judicial District Court and specifically Rule 23(A), the defendants were to submit a memorandum within seven working days prior to the hearing on the Motion for Summary Judgment. The defendants filed their memorandum on September 11, 1998, which was ten calendar days and seven working days prior to the hearing.

In the Motion for Summary Judgment, the defendants argued: (a) individual defendants are not susceptible to civil prosecution under the Louisiana Age Discrimination in Employment Act comparing similar conclusions made by the United States Fifth Circuit Court of Appeal, citing Stultz v. Conoco, 76 F.3d 651 (5th Cir., 1996), (b) the Civil Service Commission provides exclusive remedies for Howard McCain, and thus his rights under the Louisiana Age Discrimination in Employment Act and the Age Discrimination in Employment Act are thus thwarted by its jurisdiction, and (c) the plaintiff cannot prove his case on the merits.

The district court entertained this Motion for Summary Judgment on September 21, 1998. At that time, the Court indicated that it would grant the Motion for Summary Judgment as to the individual defendants under Stultz, and would take under advisement the issue of whether the Civil Service Commission has exclusive jurisdiction for the claimant, thus displacing a claim under the Age Discrimination in Employment Act and the Louisiana Age Discrimination in Employment Act. The following day, on September 22, 1998, the Court entered a Minute Entry which

provided as follows:

> "**MINUTE ENTRY**
>
> This matter is before the Court on a Motion for Summary Judgment by defendants. The matter was set for hearing on September 21, 1998. After granting summary judgment in favor of all individual defendants, the Court took the issue of summary judgment as to the City of Lafayette under advisement.
>
> This suit arises out of a claim by a plaintiff that he was wrongfully discharged from his employment with the City of Lafayette due to age discrimination. The plaintiff initially appealed his termination to the Lafayette Municipal Government Employees Civil Service Board. This appeal was unsuccessful with the Civil Service Board holding the plaintiff's termination was 'in good faith' and for 'cause'. Plaintiff failed to appeal the board's decision. After delays for appeal had run, the plaintiff filed the instant suit.
>
> The Court finds that it lacks jurisdiction to hear the instant suit. Under Article 10, Section 12 (B) of the Louisiana Constitution of 1974, a Civil Service Board has exclusive original subject matter jurisdiction over all removal and disciplinary cases. Myers v. Ivey, 635 So.2d 632 (La. App., 3rd Cir., 1994); Eubanks v. City of Opelousas, 590 So.2d 740 (La. 3rd Cir., 1991).

Plaintiff's case involves his alleged wrongful removal from a position with the City of Lafayette; therefore, the Lafayette Municipal Government Employees Civil Service Board has exclusive original subject matter jurisdiction over his case. Since plaintiffs failed to raise the issue of age discrimination in front of the Civil Service Board he cannot be allowed to now raise it for the first time in front of this Court.

Plaintiff argues that this is not an appeal from the Civil Service Board decision but an independent action seeking money damages which cannot be awarded by the Civil Service Board. However, in order for a State employee to maintain a suit for money damages in district court based upon his wrongful termination, he must first be successful in appealing his dismissal to the Civil Service Board. Reimer v. Medical Center of Louisiana at New Orleans, 688 So.2d 165 (La. App., 4th Cir., 1997); Hillard v. Housing Authority of New Orleans, 436 So.2d 685 (La. App., 4th Cir., 1983). Plaintiff was not successful in his appeal; therefore, cannot bring suit for damages based upon his termination before this Court.
Considering the foregoing, the Court hereby grants the summary judgment as to the City of Lafayette. Judgment will be signed upon presentation; costs to be paid by plaintiff.

Officially entered in chambers at Lafayette, Louisiana this 22nd day of September, 1998. Signed Edward D. Rubin, Judge, Division D."

On September 25, 1998, a Judgment was entered in conformity with the Court's Minute Entry.

On October 5, 1998, the plaintiff filed a Motion and Order for Devolutive Appeal which was granted the following day.

Then the matter was properly before the Third Circuit Court of Appeal.

On January 11, 1999, Howard McCain filed his original brief with the Third Circuit Court of Appeal.

On February 8, 1999, after seeking one extension, the defendant filed its original brief with the Third Circuit Court of Appeal.

On April 1, 1999, oral argument was held in the Third Circuit Court of Appeal.

Thereafter, on May 5, 1999, the Court of Appeal entered its decision which consisted of a nineteen page original opinion authored by Judge Amy and Judge Gremillion, and a one page dissent by Judge Peters.

The net effect of the decision of the Court of Appeal was to affirm Judge Rubin's reasoning for the dismissal of the individual employees, noting the conformity of Louisiana

courts with federal jurisprudence in discrimination cases, thus relying on Stultz v. Conoco, supra, as the basis for its decision.

As to the exclusive jurisdiction of the Lafayette Municipal Government Employees Civil Service Board, the Court of Appeal in essence reversed Judge Rubin finding that the district court was appropriate jurisdiction for a claim under the Age Discrimination in Employment Act and the Louisiana Age Discrimination in Employment Act, with its subject matter jurisdiction analysis being the bulk of its opinion, from page seven of the opinion until page fifteen of the opinion.

However, the Third Circuit Court of Appeal went on to address the merits of the Motion for Summary Judgment in that the defendants claimed that the plaintiff would not be able to carry his burden of proof, which was an issue never reached by the district court. The reasoning of the Third Circuit Court of Appeal is found from page fifteen to page nineteen. Since that is the issue that forms the basis and essence of this writ application, that analysis is repeated herein as follows:

> "**Summary Judgment - Genuine Issues of Material Fact**
>
> In their memorandum in support of summary judgment and again in their brief to this court, the defendants argue that the plaintiff will be unable to carry the requisite burden of proof to recover for age discrimination. Principally, they maintain that no genuine issues of material fact remain with regard to whether McCain was discharged due to his age.

As previously explained, La. Code Civ.P. art. 966 (C)(2) provides that a movant who will not be required to bear the burden of proving the issue before the court at trial, is not required, in a motion for summary judgment, ' to negate all essential elements of the adverse party's claim, act or defense...' Rather, the movant must only 'point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense.' Id. After the movant has satisfied this burden, the adverse party must produce adequate factual support establishing that genuine issues of material fact exist for trial. La.Code Civ.P. art. 966 (C)(2); La.Code Civ.P. art. 967.

In Taylor, 95-388; 663 So.2d 379, this court set forth the elements of an age discrimination suit by referencing those of the comparable federal statute. At the time of Taylor, a plaintiff was required to demonstrate that:

(1) he was in the protected age group between the ages of forty and seventy,
(2) his employment with the defendant was involuntarily dismissed;

(3) he was qualified to perform the job that he was employed to perform, and
(4) he was replaced by a person outside the protected age group comprising individuals between the ages of forty and seventy.

Id. at p 9; 384, quoting Lege v. N.F. McCall Crews, Inc., 625 So.2d 185, 187 (La. App. 3 Cir.)(citing Belanger v. Keydril Co., 596 F.Supp. 823 (E.D. La. 1984)), writ denied, 627 So.2d 638 (La. 1993). Reference to recent federal jurisprudence indicates that the final element listed above has changed since Taylor was rendered. In O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S.Ct. 1307 (1996), the United States Supreme Court found the plaintiff in an age discrimination case no longer has to establish that he was replaced by a person outside the protected class. The Court concluded that the plaintiff's prima facie case requires evidence creating an inference 'that an employment decision was based on a[n] [illegal] discriminatory criterion...' Id. at 313; 1310 (emphasis omitted)(alterations original)(quoting Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 (1977)).

Furthermore, in O'Connor, the Supreme Court adopted the burden of proof allocation applicable to Title VII discrimination cases for age discrimination claims. This allocation, previously set forth in the Title VII context in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), was explained by the Court as follows:

Once the plaintiff has met this initial burden [of demonstrating a prima facie case], the

burden of production shifts to the employer 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Ibid, If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. St. Mary's Honor Center, supra, at 509-510, and n. 3, 113 S.Ct., at 2748-1749, and n.3; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

O'Connor, 517 U.S. at 311; 116 S.Ct. at 1309.

In support of their motion for summary judgment, the defendants presented McCain's progress reports demonstrating 'improvement needed' ratings and correspondence perpetuated during the evaluation process. The defendants also attached the civil service board's findings of fact wherein the board concluded that McCain's performance had not sufficiently improved in the areas found to be deficient in the evaluations and that his termination was for cause. Furthermore, the defendants presented the depositions of John Raines and Aros Mouton. Raines' deposition reveals a singular incident wherein he felt that McCain had made misrepresentations in order to obtain a secretary. In the excerpts of his deposition, Mouton's testimony reveals that he

felt McCain's inability to get along with his superior, Raines, outweighed any of McCain's technical ability. We conclude the defendants' showing demonstrates the existence of legitimate reasons for McCain's dismissal.

Faced with similar evidence on a motion for summary judgment in Stults, 76 F.3d 651, the Fifth Circuit considered the defendants' demonstration in light of the presumption of discrimination discussed above. The court stated:

In a discrimination case, the plaintiff's prima facie case created a rebuttable presumption of discrimination that shifts the burden of production to the defendant to articulate a legitimate, nondiscriminatory reason for the questioned employment action. Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1505 (5th Cir. 1988). With its motion for summary judgment, Conoco submitted evaluations and termination reports regarding both Stults and Wallace that supported its claim that the plaintiff were terminated for performance deficiencies. In addition, Conoco submitted portions of relevant depositions that demonstrated the lack of evidence that its nondiscriminatory reasons were mere pretext or that its nondiscriminatory reasons were mere pretext or that its employment actions were actually motivated by age discrimination. Given this showing, we must agree with the district court that Conoco adequately

demonstrated the absence of a material fact issue on the plaintiffs' age discrimination claims.

When the employer articulates a legitimate nondiscriminatory reason, and produces competent summary judgment evidence in support, as Conoco did in this case, the presumption created by the prima facie case disappears and 'the burden reverts to the plaintiff to prove that the employer's reason[] [is] pretextual.' Moore, 990 F.2d at 815 (quoting Normand v. Research Inst. of Am., Inc., 927 F.2d 857, 859 (5th Cir. 1991). 'The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge.' Guthrie v. Tifco Industries, 941 F.2d 374, 377 (5th Cir. 1991), cert. denied, 503 U.S. 908, 112 S.Ct 1267, 117 L.Ed.2d 495 (1992).

The plaintiff at all times retains the burden of persuading the trier of fact that impermissible discrimination motivated the adverse employment decision. Bienkowski, 851 F.2d at 1505...

Id. at 656-58 (emphasis added).

As the defendants satisfied the burden required to sustain the motion for summary judgment, the burden then shifts to McCain to demonstrate that any legitimate reason for

dismissal was pretextual. Stults, 76 F.3d 651. In opposition to the motion for summary judgment, McCain submitted the deposition testimony of his superiors wherein they discussed reasons for his termination and reasons why demotion was not an option. Further, McCain submitted correspondence demonstrating difficulties in his working relationship with Raines. Neither the depositions nor the correspondence indicate that McCain was terminated due to his age. McCain did, however, present an excerpt from the deposition of his replacement, Tom Carroll, for the proposition that he was replaced by a younger person and the deposition testimony of Horace Rickey, an unsuccessful applicant for McCain's former position who was older than McCain. We do not conclude that this evidence is sufficient to create a genuine issue of material fact with regard to the motivation behind McCain's removal. In fact, due to the documented difficulty in the relationship between Raines and McCain, much of McCain's submission supports the defendants' assertion that legitimate reasons existed for the City's action.

Although we have concluded that the lower court erred in some respects in finding no subject matter jurisdiction, we conclude that the motion for summary judgment was properly granted as the plaintiff failed to satisfy the requisite burden of establishing the existence of a genuine issue of material fact."

(Third Circuit Slip Opinion at Pages 15-19, Emphasis in Original).

Judge Peters respectfully dissented from the opinion of Judge Amy and Judge Gremillion, finding "...there are genuine issues of material fact which must be resolved by further trial proceedings."

Thereafter, an Original Application for Writ of Certiorari was filed on behalf of Howard Mitchell McCain, Jr. On September 17, 1999, the Supreme Court of Louisiana denied Howard McCain's writ application.

This writ application follows.

FACTUAL HISTORY

The material facts pertinent to this writ are not in dispute. The plaintiff was employed with The City of Lafayette for the periods set out before. However, for background purposes, we would note the following being of record in this matter.

Howard Mitchell McCain was born on August 5, 1935 and was 59½ years old when terminated in January of 1995 with the City of Lafayette. (McCain Depo, 8).

In May of 1978, Howard McCain became employed with the City of Lafayette in the capacity as City Engineer. (McCain Depo, 9). He continued in this capacity until he was promoted to the Office of Capital Improvements Manager by Mayor Kenneth Bowen in March of 1993. After his appointment, John Raines was appointed to the job of Director of Public Works in April of 1993.

John Raines' birthdate is December 1, 1951. Accordingly, he would have been 41 as of the time of his appointment to the job of Director of Public Works. (Raines Depo, 6).

A performance evaluation was due on an annual basis to evaluate the performance of employees including Howard McCain. Howard McCain's evaluation would have been due in May of 1994 as that would have been the anniversary of his employment. That fact is undisputed. It is shown in both the depositions of Howard McCain as well as John Raines. No performance evaluation was done by John Raines when it was due in May of 1994, however.

Instead, on July 7, 1994, Chief Administrative Officer Aros Mouton directed a routing and request slip to John Raines directing John Raines to fire Howard McCain as is shown in Exhibit "A" to the deposition of Aros Mouton. Thereafter, an out of time performance evaluation was performed by John Raines dated August 8, 1994, three months after the performance evaluation was due, and was supplied to Howard McCain on August 17, 1994. The overall evaluation noted "improvement needed". Thereafter, three successive thirty day evaluations were done of Howard McCain by John Raines. All were regarded as "unsatisfactory". In December of 1994, John Raines recommended the termination of Howard McCain. This was only seven months before his slotted retirement after seventeen years of excellent performance with the City of Lafayette.

In December of 1994, John Raines recommended the termination of Howard McCain. Howard McCain requested that in lieu of termination he simply be demoted to his

previous job of City Engineer, which he had performed in such an outstanding fashion for the course of fifteen years that he actually received the promotion to Capital Improvements Manager. This request for demotion was resisted by John Raines. However, Aros Mouton, the then Chief Administrative Officer, Kenneth Bowen, the then Mayor, and Kenneth
Joseph Mouton, the then Division Head of Employee Relations, all thought this request for demotion was "reasonable".

Aros Mouton testified at pages 46 through 49 of his deposition that he thought it was reasonable for Howard McCain to be offered his old job as City Engineer, but had the incorrect independent recollection that the job opportunity was actually afforded to Howard McCain. It clearly was not.

Kenneth Joseph Mouton was the Division Head of Employee Relations in charge of Human Resources and EEO issues at the time of the termination of Howard McCain. When asked about the appropriateness of demotion to the job of City Engineer, Kenneth Joseph Mouton testified as follows:

> "Q. From this vantage point now, did you agree with the recommended termination that came four (4) months later?
>
> A. Did we agree with it? I think we made a pitch to maybe demote him or find another place for him. but that was not our decision. It was just like a recommendation. We do that all the time, yeah.

Q. That's reasonable?

A. Yeah. Especially for those type of -- His was not for being -- what we can misconduct, but it was for a substandard performance. So, we attempt to recommend other places they could be placed if there is a place available. If there's no place available, then termination is the only other outlet.

Q. It would seem to me -- And this is not really a question. This is a predicate. The question will follow it. It would seem to me that if Mr. McCain had performed as a city engineer for fifteen (15) years to some level of proficiency that he gets promoted to the Capital Improvements manager, that he would, if he didn't perform well at the Capital Improvements manager position, still be a candidate for working as a city engineer with the city. Is that the kind of thought process you had that was behind your recommendation of demotion?

A. You see -- What was available? You see, he was -- He was the CI manager. We were looking at another engineering spot. And I think we thought if somebody would move into CID to replace him, then he would -- then could be demoted into that other spot.

Q. Right. Like, for instance, Tom

Carroll, city engineer, he moves up. You recommendation was that it was reasonable to put Mr. McCain back to city engineer?

A. To -- What was it called? I forgot the -- The official title was what? Public project or something engineer, yeah.

Q. That was your reasonable --

A. I think he had been there before.

MR. MCCAIN: Public Works city engineer for fifteen (15) years. That was a long time ago.

THE WITNESS: Yeah. I think that was the spot we were looking at as a potential.

Q. (By Mr. Iles) Who else joined you in the recommendation of demotion to that position?

A. Probably Jim Pollock.

Q. Jim Pollard?

A. Pollock." (Mouton Depo, 15-17).

In terms of the availability of demotion, Mayor Bowen testified as follows:

"Q. Okay. Let me ask you this, because it occurs to me there is some middle ground.

How come Mr. McCain couldn't be demoted back to the job of City Engineer or staff engineer?

A. I don't know. I don't think Howard accepted that offer as a compromise, as I recall. I don't recall the issue. But he would have to tell you that. I don't recall him accepting the compromise.

Q. Okay, let me ask you this, then, and I'll ask it in a different way. That was a bad question. Wouldn't it have been reasonable for you all--

A. I was amenable.

Q. And just so we're on the same page, you had been amenable to demoting Howard so he is no longer in the bad infrastructure that you have described?

A. He could have been in there, but he wouldn't have the authority and the responsibility that he had with his job." (Bowen Depo, 38-39).

Additionally, the Mayor testified as follows:

"Q. He [McCain] was competent in your judgment?

A. Oh, yes, sir. As is Tom Carroll, by the way, in my opinion.

Q. And Mr. McCain, in your opinion?

A. Yeah, sure. It wasn't an issue of competency. My being here today has nothing to do with the issue of this man being competent?

Q. It has to do him getting along with John Raines?

A. That was it and arguing and he ain't -- What is the old saying? The boss is not always right, but he is always the boss.

Q. But through it all, even after you decided to accept John Raines' recommendation to terminate him, you felt that he would have been an appropriate candidate for a lesser job; is that correct?

A. I would have considered that as it was conjured up, and I think -- I don't know this, but I think it came from downstairs with his dear friend Lee Eilers being able to take and conceivably help him to retain something. But Howard was a man in my recollection that did not want that.

Q. You thought it was reasonable?

A. It would have been reasonable to consider that. But if the man didn't want that, you can't give it to him; it is caster oil to him.

Q. I understand.

A. Good." (Bowen Depo, 47-48).

Following the termination of Howard Mitchell McCain from his job as Capital Improvements Manager, he was replaced by Thomas Roberson Carroll, III who has been selected by John Raines. At the time, Mr. Carroll would be 42 years old. Mr. Carroll's credentials were that he had graduated from Opelousas High School, had gone to USL from 1970 until 1974, graduated in Civil Engineering, and worked for the City as an Interim Project Engineer from September of 1991 until the Spring of 1993 when he was promoted to City Engineer. That would have corresponded with Howard McCain's promotion from City Engineer to Capital Improvements Manager. Howard McCain was promoted to the position of Capital Improvements Manager. Mr. Carroll was actually appointed in December of 1994 to Interim Capital Improvements Manager and was given the official position in April or May of 1995. (Carroll Depo, 6-8).

When testing for the position, Mr. Carroll had scored a 100. (Carroll Depo, 9).

There was one other applicant for the job of Capital Improvements Manager when Howard McCain was suspended. That individual would have been Horace Bushnell Rickey, Jr. On the same test, Mr. Rickey had a scored 105. (Rickey Depo, 16). Furthermore, Mr. Rickey had education and experience including being a Jesuit High School graduate in New Orleans, college at Tulane, University of Wyoming, UCLA, and LSU. He has degrees in Civil Engineering as well as Architectural Engineering. He is a licensed Civil

Engineer and Environmental Engineer. He is also a licensed surveyor. (Rickey Depo, 5-7).

Despite a higher score on the part of Horace Rickey and a vast amount of experience as a civil, architectural and environmental Engineer, Horace Rickey had one draw back. He was 69 years old at the time of the application. He did not get the job.

We know that Howard McCain performed his job as City Engineer in a satisfactory manner, and to the point where he was promoted to Capital Improvements Manager. There, Howard McCain was owed an evaluation in May of 1994 as to his performance as Capital Improvements Manager. He did not receive that performance evaluation. However, the decision was made on July 7, 1994 to fire Howard McCain. Thereafter, for the first time in the history of his employment with the City of Lafayette, Howard McCain received an "improvement needed" overall evaluation.

Mr. McCain disputed each and every area complained of by John Raines in a formal submission made to the City of Lafayette. His reply went unanswered. Thereafter, in the next three consecutive evaluations, Howard McCain was again given unsatisfactory rankings and recommended for termination.

Because Howard McCain had previously functioned as City Engineer in such a proficient fashion that it warranted promotion, and because the City Engineer job had become available by virtue of the promotion of Tom Carroll, Howard McCain asked for his old job back. Though all involved except John Raines believed that was reasonable, this request was refused. Howard McCain was instead terminated within

seven months of his slated retirement.

After Howard McCain's termination, another older individual applied for the job of Capital Improvements Manager. That individual possessed a higher score in the application process as well as a vast amount of experience. The promotion was refused to this individual who was 69 years old, and given to a 42 year old man who had only one year of experience as a City Engineer with the City of Lafayette.

Furthermore, the job of City Engineer that was requested by Howard McCain was given to a 34 year old man, Mitch Wyble. (Carroll Depo, 40; Raines Depo, 174-175). (Plaintiff's Opposition to Motion for Summary Judgment, Pages 7-13).

REASONS FOR GRANTING THE PETITION

In the instant decision, there is no doubt that Howard McCain prevailed in demonstrating a prima facie case of discrimination on the part of his employer, the City of Lafayette, in that McCain demonstrated:

(1) He was in a protected age group between the ages of 40 and 70,
(2) His employment with the defendant was involuntarily terminated,
(3) He was qualified to perform the job that he was employed to perform, and
(4) He was replaced by a person outside the protected age group comprising individuals between the ages of 40 and 70.

In O'Connor v. Consolidated Coin Caterers Corporation, supra, this Honorable Court made it clear that the plaintiff no longer has to establish that he was replaced by a person outside the protected class. However, in this case, the plaintiff was protected by a person substantially younger, and the refusal to return Mr. McCain to his former position was discriminatory, and the individual that filled that vacant position sought by McCain, that being Mitch Wyble, was outside the protected category, being 34 years of age.

Considering the evidence presented by Mr. McCain and the factors set out by this Honorable Court, the Louisiana Appellate system failed the plaintiff in his congressionally protected rights. Accordingly, it is prayed that this Court grant this writ of certiorari, and eventually reverse the Appellate Court, and return this matter to the District Court for a trial on its merits. To do otherwise would allow for an

unlawful weighing of contradictory evidence in violation of this Honorable Court's trilogy of decisions on a Motion for Summary Judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), Celetex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and Matsushita Electric Industrial Company v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

CONCLUSION

Howard McCain produced substantial evidence demonstrative of discrimination in violation of his congressionally protected rights against age discrimination, and was successful in producing substantial evidence demonstrative of a pretext for his termination. Accordingly, the Louisiana Appellate Courts should be reversed and this matter remanded for a merit trial on the claimant's federally protected rights.

Respectfully submitted:

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November 16, 1999

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

HOWARD MITCHELL MCCAIN, JR.

VS. NO. 99-C-1578

THE CITY OF LAFAYETTE, ET AL

IN RE: McCain, Howard Mitchell Jr.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Lafayette 15th Judicial District Court Div. "D" Number 95-3770-1A; to the Court of Appeal.

September 17, 1999

Denied.

BJJ
PFC
WFM
HTL
CDK
JTK

TRAYLOR, J. not on panel.
Supreme Court of Louisiana
September 17, 1999

Rai T. Daigle
Deputy Clerk of Court For the Court

APPENDIX B

"NUMBER 98-1902

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HOWARD MITCHELL MCCAIN, JR.
PLAINTIFF-APPELLANT

VERSUS

THE CITY OF LAFAYETTE, ET AL
DEFENDANTS-APPELLEES

On appeal from the Fifteenth Judicial District Court, Docket number 95-3770, Parish of Lafayette, State of Louisiana, the Honorable Edward D. Rubin, District Judge, presiding.

Before PETERS, AMY and GREMILLION, Judges.

AMY, Judge.

The plaintiff filed suit in district court asserting that the City of Lafayette and his superiors wrongfully discharged him from his employment with the city due to his age. Upon motion for summary judgment by the defendants, the lower court concluded that the age discrimination statute under which the suit was filed did not permit such an action against the individual defendants and, therefore, dismissed them from the suit. Furthermore, the lower court concluded that no subject matter jurisdiction existed for the civil suit as the discrimination action stemmed from the plaintiff's removal

from office and, therefore, the matter had to first be raised before the civil service board. The plaintiff appeals both aspects of this two-fold judgment. For the reasons which follow, we affirm.

Factual and Procedural Background

The plaintiff in this matter, Howard Mitchell McCain, Jr., was employed by the City of Lafayette as the Capital Improvements Manager in 1993-1994. The record indicates that, following several evaluations indicating that areas of his job performance needed improvement, McCain's employment was terminated effective January 3, 1995. McCain, who was fifty-nine at the time, alleges that he was only several months from retirement when he was discharged.

Following the termination, McCain appealed the discharge to the Lafayette Municipal Government Employees Civil Service Board. Following hearings that lasted several days and included the calling of witnesses, the civil service board concluded that the discharge was made in good faith and that cause existed for the termination. There is no indication in the civil service board's findings of fact that an allegation of age discrimination was placed at issue by the plaintiff.

On August 25, 1995, the plaintiff filed a petition instituting the case sub judice alleging that the City of Lafayette discriminated against him due to his age. He sought recovery pursuant to La.R.S. 23:971, et seq. The City of Lafayette was named as a defendant as were Kenneth Bowen, Mayor of the City of Lafayette, Aros Mouton, Chief Administrative Officer, and John Raines, the Director of Public Works. Raines was the plaintiff's direct supervisor.

The petition indicates that the plaintiff sought compensation for loss of sick leave/pay, vacation time, retirement, income deferment, retirement program contributions, and business reputation. Additionally, McCain sought general damages.

In July, 1998, the defendants filed a motion for summary judgment. In a supporting memorandum, the defendants first asserted that a suit pursuant to La.R.S. 23:971, et seq. could not be brought against the individual supervisors. Next, the defendants alleged that the district court did not have subject matter jurisdiction to hear any age discrimination suit against the City as McCain failed to initially raise the issue before the civil service board. Finally, the City argued that, even if the district court was found to have subject matter jurisdiction, the plaintiff would be unable to prove that he was discharged due to age discrimination. In support of this motion for summary judgment, the defendants filed depositions and affidavits from the individuals involved as well as related documents, including the evaluations and correspondence between the parties relating to the evaluations/termination process. In opposition, the plaintiff filed deposition excerpts and memoranda related to the parties' working relationship.

The lower court found in favor of the defendants. In a minute entry detailing the reasons for ruling, the lower court concluded that La. Const. art. X, § 12 granted original jurisdiction in the civil service board since the cause of action stemmed from the plaintiff's removal and that, since the plaintiff failed to pursue the issue before the civil service board, he was precluded from bringing it before the court.

The plaintiff appeals assigning the following as error:

1. The District Court erred in dismissing the individual defendants as this Court of Appeal has not adopted the holdings of the United States Fifth Circuit Court of Appeal in disallowing individual defendants in an Age Discrimination in Employment Act claim.

2. The District Court erred in granting The City of Lafayette's Motion for Summary Judgment finding that civil service remedies are exclusive remedies which displace rights under the Age Discrimination in Employment Act and under the Louisiana Age Discrimination in Employment Act.

Discussion

This matter is on appeal following summary judgment, La.Code Civ.P. art. 966(A)(1) provides that a party may move for summary judgment any time after the filing of the answer. Article 966(B) requires that summary judgment be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." Furthermore, La.Code Civ.P art. 966 (C)(2) provides as follows:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to he court

> that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

An appellate court's review of a summary judgment is de novo and employs the same criteria considered by the lower court. Kumpe v. State, 97-386 (La. App., 3 Cir. 10/8/97), 701 So.2d 498, writ denied, 98-0050 (La. 3/13/98); 712 So.2d 882. Mindful of this standard, we turn to the issues presented for review.

Individual Liability

Although no reasons are explained in the reasons for ruling, the judgment signed by the lower court dismissed the individual defendants. Bowen, Mouton, and Raines, from the suit. The defendants' memorandum supporting the motion for summary judgment contains the argument that the analogous federal law precludes an age discrimination claim against individual defendants. In his first assignment of error, the plaintiff maintains that the court's reliance on federal law is misplaced. McCain contends that "our State version of the Louisiana Age Discrimination in Employment Act is not meant to mirror that of the Federal Rule." Furthermore, he contends that the jurisprudence of this circuit, namely Taylor v. Oakbourne Country Club, 95-388 (La. App 3 Cir. 10/4/95); 663 So.2d 379, indicates that an action under the Louisiana statute may be maintained against individual defendants.

McCain filed suit under La.R.S. 23:971, et seq. At the time of the actions at issue, these statutes created a cause of action for age discrimination by an employer.1 The following definition is provided for "employer":

1 LaR.S. 23:971, et seq. was repealed in 1997. Similar provisions are now found in La.R.S. 23:311, et seq. which are located in a chapter entitled "Prohibited Discrimination in Employment".

> §971. Definitions
>
> For the purposes of this Part, the following terms shall have the definitions as ascribed below unless the context indicates otherwise:
>
> (1) "Employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. The term also means any agent of such person...

At issue in this assignment is whether the phrase "agent for such person..." includes individual supervisors. The defendants maintain that the definition cannot includes these individuals as federal courts have interpreted a similar federal provision as not including these supervisors.

Upon comparison, the federal statute referenced by the

defendants prohibits an employer from discriminating against an individual due to age and provides a substantively similar definition of "employer". 29 USC §630(b) contains the following definition:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) *any agent of such a person*, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(Emphasis Added). In Stults v. Conoco, 76 F.3d 651 (5th Cir 1996), a panel of the United States Court of Appeals, Fifth Circuit concluded that the definition does not permit a cause of action against individual supervisors who do not otherwise qualify as an employer. Rather, the Fifth Circuit cited a Fourth Circuit case wherein it was reasoned that imposition of liability would place a heavy burden on personnel decisions and the following interpretation was offered: "Instead, we read § 630 (b) as an unremarkable expression of respondeat superior - that discriminatory personnel actions taken by an employer's agent may create liability for the employer.'" Id. at 655, quoting Birkbeck v. Marvel Lighting Corp., 30 F.3d

507, 510-11 (4th Cir.), cert. denied, 513 U.S. 1058, 115 S.Ct. 666 (1994).

While the plaintiff argues that the lower court should not have relied upon federal jurisprudence interpreting a federal statute, related federal law is commonly used as guidance by courts of this state in interpreting discrimination statutes. See King v. Dunbar, 97-2519 (La. App 4th Cir 6/3/98); 716 So.2d 104, writ granted, _ So.2d _ (La. 11/25/98); Craven v. Universal Life Ins. Co., 95-1168 (La. App. 3 Cir. 3/6/96); 670 So.2d 1358, writ denied, 96-1332 (La. 9/27/96); 679 So.2d 1355. Thus, considering applicable federal law, we find no legal error in the lower court's conclusion that La.R.S. 23:671, et seq. does not include a cause of action against individual supervisors.

As for the plaintiff's assertion that this court has previously approved a cause of action against individual supervisors in Taylor, 95-388; 663 So.2d 379, we find this argument to be without merit as well. In Taylor, a plaintiff brought an age discrimination claim against both his supervisor and the country club at which he worked. At the district court level, summary judgment as entered in favor of the defendants. A panel of this court concluded that genuine issues of material fact remained as to whether the plaintiff was discharged due to his age and reversed the summary judgment. Although the decretal paragraph in that opinion indicates the summary judgment was reversed in favor of both the country *and the supervisor*, and cots were assigned to each, the issue of whether the individual supervisor was an appropriate defendant does not appear to have been raised. In any event, the issue was not addressed in Taylor. Furthermore, this case relied upon by the plaintiff also stands for the proposition that federal law may be used as guidance

by Louisiana courts in interpreting related discrimination statutes. As explained above, pertinent federal case law indicates that the age-discrimination statutes do not provide a cause of action against individual supervisors.

Subject Matter Jurisdiction

In his next assignment of error, McCain argue the lower court erred in determining that it lacked subject matter jurisdiction to hear the age discrimination matter due to his failure to bring the issue before the civil service board. McCain asserts that his suit brought under the age discrimination statute permits damages that could not have been awarded by the civil service board and, therefore, the board is not afforded original jurisdiction over the matter.

La.Const. art. X § 12 provides for the jurisdiction of the civil service board as follows:

> **(B) Cities.** Each city commission established by Part I of this article shall have the exclusive power and authority to hear and decide all removal and disciplinary case, with subpoena power and power to administer oaths. It may appoint a referee to take testimony, with subpoena power and power to administer oaths to witnesses. The decision of a commission shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located, upon application filed with the commission within thirty calendar days after its decisions becomes final.

The minute entry containing the lower court's reasons for ruling reflect the following:

> The Court finds that it lacks the jurisdiction to hear the instant suit. Under Article X, Sec. 12(B) of the Louisiana Constitution of 1974, a city civil service board has exclusive original subject matter jurisdiction over all removal and disciplinary cases. Myers v. Ivey, 635 So.2d 632 (La. App 3 Cir. 1994); Eubanks v. City of Opelousas, 590 So.2d 740 (La. App. 3 Cir. 1991). Plaintiff's case involves his alleged wrongful removal from a position with the **CITY OF LAFAYETTE**; therefore, the Lafayette Municipal Government Employees Civil Service Board has exclusive original subject matter jurisdiction over his case. Since plaintiff failed to raise the issue of age discrimination in front of the Civil Service Board he cannot be allowed to now raise it for the first time in front of this Court.
>
> Plaintiff argues that this is not an appeal from the Civil Service Board decision but an independent action seeking money damages which cannot be awarded by the Civil Service Board. However, in order for a state employee to maintain a suit for money damages in district court based upon his wrongful termination, he must first be successful in appealing his dismissal to the Civil Service Board. Reimer v. Medical Center of Louisiana at New Orleans, 688 So.2d 165 (La. App. 4 Cir. 1997); Hillard v.

> Housing Authority of New Orleans, 436 So.2d 685 (La. App. 4 Cir. 1983). Plaintiff was not successful in his appeal; therefore, [he] cannot bring a suit for damages based upon his termination before this Court.

The defendants maintain that the lower court's position was correct. They assert that it is the plaintiff's "removal" that is at issue and, therefore, the exclusive jurisdiction provision of Article X, Section 12 is at work in this case. According to the defendants' argument, the classification of this claim as a "tort" for which general damages are recoverable is irrelevant to the jurisdiction issue. Rather, the defendants appear to argue that since the civil service board had the power to consider the issue of age discrimination, the fact that the civil service board could not award the type of damages did not preclude the necessity of raising the issue before the board.

As urged by the defendants, McCain's "removal" from his position with the City of Lafayette is at the root of his age discrimination claim. At first glance, this core issue would appear to place original jurisdiction with the civil service board pursuant to Article X, § 12. In Reimer v. Medical Center of Louisiana, 95-2799 (La. App. 4 Cir. 1/29/97); 688 So.2d 165, a discharged employee of the defendant medical center filed suit in district court for retaliatory discharge and discrimination based upon a handicap or disability. The fourth circuit rejected the plaintiff's contention that the subject matter jurisdiction existed in the district court since his action had a specific statutory basis, La.R.S. 46:2254 and La.R.S. 51:2242. The Court states as follows:

> Mr. Reimer claims that he is a civil servant

> whose removal was wrongful and not for the reason stated. that his petition makes reference to other statutes does not changes the nature of his claim. The authority to review the basis for a termination of a civil servant's employment and decide whether it was in accordance with law is expressly and unambiguously assigned to the CSC, subject to the right of judicial review, in Section 12(A) of Article X.

Id. at p. 4; 168 (citation omitted). The court also rejected the plaintiff's alternative argument that concurrent jurisdiction existed between the forums.

Further, in Reimer, the fourth circuit also rejected the plaintiff's argument that the district court was the proper forum since he sought a money judgment and not a reinstatement. The court stated as follows in his regard:

> Mr. Reimer's removal is at the heart of his suit. In order for him to be entitled to damages it must be determined that the was unlawfully discharged from his position.
>
> Mr. Reimer is correct that the CSC cannot award general tort damages, such as for injury to reputation or an invasion of privacy. See e.g., Greenleaf v. DHH, Metropolitan Developmental Center, 594 So.2d 418 (La. App. 1st Cir. 1991), writ denied, 596 So.2d 196-97 (La. 1992), and cases cited therein. The CSC could, however, in addition to an award of costs and attorney fees, award back

> pay and order that all benefits and emoluments of office be restored to Mr. Reimer. Blappert v. Department of Police, 94-1284, pp. 6-7 (La. App. 4th Cir., 12/15/94), 647 So.2d 1339, 1343. If such an award would be inadequate to fully compensate Mr. Reimer for the harm suffered, he then could assert his claim in Civil District Court. Hilliard, 436 So.2d at 687.

Id. at p 6-7; 169.

Similarly, a panel of this court in Myers v. Ivey, 93-1166 (La. App 3 Cir 4/6/94); 635 So.2d 632, found that an employment suit in tort, for intentional infliction of emotional distress, could not first be filed in district court. The court stated as follows:

> Myers attempts to circumvent the exclusive jurisdiction of the City Civil Service Commission by filing this tort action against his supervisors and the department alleging a conspiracy to intentionally inflict emotional distress. Myers has cited no cases, nor have we found any, which allow such an independent action in district court. The entire thrust of the exclusive jurisdiction grant is to preclude district courts from having concurrent jurisdiction with the Civil Service Commissions over classified civil service employer-employee disputes that are employment related. Foreman v. Falgout, 503 So.2d 517 (La. App. 1st Cir. 1986).

Id. at 633.

However, in Landrum v. Board of Commissioners of the Orleans Levee District, 95-1591 (La. App. 4 Cir. 11/27/96); 685 So.2d 382, the fourth circuit concluded that an employment-based tort suit against a government body could be brought in district court. The plaintiff in Landrum was a police officer whose employment was terminated due to the results of a drug test. Although he appealed the termination to the Civil Service Commission, the parties reached an agreement wherein the employer reinstated the plaintiff, provided back pay and generals, and removed the records of the disciplinary action from his personnel file. In exchange, the plaintiff resigned from his position. Subsequently, the plaintiff filed a civil suit alleging intentional/negligent infliction of emotional distress, defamation, and invasion of privacy. The district court overruled the employer's exception of subject matter jurisdiction. On appeal, the fourth circuit affirming the finding of subject matter jurisdiction concluding that, due to his voluntary resignation, the plaintiff had no claim against his employer arising from his previous suspension or removal. the fourth circuit stated:

> The constitutional provision that grants judicial authority to the Commission is narrowly construed since it is an exception to the general rule that district courts have jurisdiction over all civil matters. Greenleaf v. Metropolitan Developmental Center, 594 So.2d 418, 425 (La. App 1st Cir. 1991) [citing In Re Investigation of Smith, 546 So.2d 561, 563 (La. App. 1st Cir.), writ denied 550 So.2d 636 (La.1989)], *writ denied*, 596 So.2d 196 (La.1992). The Civil Service Commission

> does not have jurisdiction of tort cases nor can it award monetary damages for tortious conduct. *Greenleaf*, 594 So.2d at 425; *see also Moore v. Board of Supervisors of L.S.U.* 559 So.2d 548 (La.App. 2nd Cir. 1990). Under the circumstances of this case, Mr. Landrum's tort claims are not an attempt to circumvent the exclusive jurisdiction of the Civil Service Commission; he may look to the courts for damages for defamation and other torts arising out of the facts alleged here. *Moore, supra; Manale v. City of New Orleans*, 673 F.2d 122 (5th Cir. 1982); *see also Greenleaf, supra*. For this reason, the trial court correctly overruled the exception to its subject matter jurisdiction.

Id. at p. 4-5; 387.

The subject matter jurisdiction issue was recently raised before the first circuit in *Crockett v. State Through Department of Public Safety and Corrections*, 97-2528 (La.app. 1 Cir. 11/6/98); 721 So.2d 1081. The plaintiff in the first circuit matter was employed as a correctional officer at the Louisiana State Penitentiary. He filed suit is district court seeking damages for mental anguish related to a body cavity search he underwent. The trial court granted the employer's exceptions of subject matter jurisdiction and prematurity. The first circuit reversed the judgment finding that the plaintiff did not establish that his suit was one for either removal or disciplinary action. The first circuit then focused upon the employer's claim that even if the plaintiff's claim "is outside the exclusive jurisdiction of the Commission, he must pursue and not abandon his civil service

administrative remedy before bringing a tort action in district court." *Id.* at 6; 1084. The court observed as follows:

> Because the allegations of Crockett's petition set forth a tort claim and the Commission cannot grant the requested relief, Crockett cannot be required to have this matter addressed by the Commission before bringing his tort action in district court. When an exception of prematurity is brought on the ground that the plaintiff has failed to exhaust his administrative remedies, the exceptor has the burden of showing that an administrative remedy exists. Upon that showing, the burden shifts to the plaintiff to show that he has exhausted those remedies. *Kenner Firefighters Ass'n Local No. 1427 v. City of Kenner*, 96-361, pp. 5-6 (La.App. 5th Cir. 11/14/96); 685 So.2d 265, 268. Based on the record which indicates no evidence was introduced, we find that State has not established the existence of a meaningful administrative remedy. *See R.A.K. v. Board of Trustees of the State Employees Group Benefits Program, Department of Treasury*, 558 So.2d 633, 635 (La.App. 1st Cir. 1990). Thus, we reverse the judgment of the trial court granting the exception raising the objection of prematurity.

Id. at p. 6; 1084. While no exception of prematurity is at issue in the instant case, we consider the court's observation that, since the civil service commission could not grant relief for the tort damages sought, the plaintiff could not be expected to first raise his claim before the commission.

Although the above-referenced cases are useful guidance, we do not find that any of the jurisprudence squarely addresses the difficulties presented by the instant matter. Certainly McCain's removal from his position with the City, even if due to age discrimination, is at the heart of his civil suit. This would seem to indicate that La.Const. art. X § 12 provides for the civil service board to have jurisdiction over such a matter. Since a civil service board can hear claims related to removal, they should be able to decide claims for removal due to discrimination. However, while the board may be able to hear such a claim, the board is powerless to award the type of tort damages sought by the plaintiff. This factor has been presented in several of the cases discussed above.

In *Reimer*, 95-2799; 688 So.2d 165, the fourth circuit concluded that, if any award granted to the plaintiff by the civil service board was inadequate to compensate him for any injury, he could then assert his claim in district court. This reasoning is problematic as any cause of action that could subsequently be brought in district court could possibly prescribe while the defendant waited for the civil service board's resolution of the underlying removal issue. We find no jurisprudential or legislative authority indicating such a plaintiff's cause of action does not exist until the civil service board renders its decision or that prescription is suspended until such time. This can be seen to be especially problematic in instances where a civil service board finds no wrongful discharge. Under such a circumstance, it would appear that the plaintiff would have to first avail himself of his right to appeal the board's determination to the court of appeal. *See* La.Const.art. X, § 12. This process could obviously continue past the applicable prescriptive period for causes of action in tort. Due to this civil service process, an employee could lose

all damages that could not be awarded by a civil service board, *e.g.* general damages, simply because the cause of action had prescribed. We find nothing to suggest that a city employee has any less right to assert entitlement to damages for tortious conduct than one employed by a private employer.

Due to the above-noted complexity, we do not conclude that the civil service board has exclusive jurisdiction to hear those type of cases wherein the remedy sought could not be awarded by the board. In the petition instituting the present matter, the plaintiff sought damages due to loss of sick and vacation leave, health insurance, and retirement benefits. These appear to be the type of remedies that could be awarded to the plaintiff for wrongful termination even if for discrimination, by the civil service board. Thus, the civil service board would have been the appropriate place to seek recovery for these damages. We find no error in the summary judgment in this regard. However, the civil service board is powerless to award other damages sought by the plaintiff, *e.g.* general damages and loss of business reputation. In this regard, we conclude that the lower court had subject matter jurisdiction over these issues.

Since the lower court concluded that no subject matter jurisdiction existed, the judge never reached the defendants' alternative contention that, even if jurisdiction existed, the motion for summary judgment should be granted as no genuine issues of material fact exist. As summary judgments are reviewed *de novo*, we turn to this remaining assertion.

Summary Judgment - Genuine Issues of Material Fact

In their memorandum in support of summary judgment and again in their brief to this court, the defendants argue that

the plaintiff will be unable to carry the requisite burden of proof to recover for age discrimination. Principally, they maintain that no genuine issues of material fact remain with regard to whether McCain was discharged due to his age.

As previously explained, La.Code Civ.P. art. 966(C)(2) provides that a movant who will not be required to bear the burden of proving the issue before the court at trial, is not required, in a motion for summary judgment, "to negate all essential elements of the adverse party's claim, action or defense...." Rather, the movant must only "point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense." *Id.* After the movant has satisfied this burden, the adverse party must produce adequate *factual support* establishing that genuine issues of material fact exist for trial. La.Code Civ.P. art. 966(C)(2); La.Code Civ.P. art. 967.

In *Taylor*, 95-388; 663 So.2d 379, this court set forth the elements of an age discrimination suit by referencing those of the comparable federal statute. At the time of *Taylor*, a plaintiff was required to demonstrate that:

> (1) he was in the protected age group between the ages of forty and seventy,
> (2) his employment with the defendant was involuntarily terminated,
> (3) he was qualified to perform the job that he was employed to perform, and
> (4) he was replaced by a person outside the protected age group comprising individuals between the ages of forty and seventy.

Id. at p. 8; 384, *quoting Lege v. N.F. McCall Crews, Inc.* 625

So.2d 185, 187 (La.App. 3 Cir.) (citing *Belanger v. Keydril Co.* 596 F.Supp. 823 (E.D.La. 1984)), *writ denied*, 627 So.2d 638 (La.1993). Reference to recent federal jurisprudence indicates that the final element listed above has changed since *Taylor* was rendered. In *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308, 116 S.Ct. 1307 (1996), the United States Supreme Court found the plaintiff in an age discrimination case no longer has to establish that he was replaced by a person outside the protected class. The Court concluded that the plaintiff's prima facie case requires evidence creating an inference "that an employment decision was based on a[n] [illegal] discriminatory criterion...." *Id.* at 313; 1310 (emphasis omitted)(alterations original)(quoting *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 (1977)).

Furthermore, in *O'Connor*, the Supreme Court adopted the burden of proof allocation applicable to Title VII discrimination cases for age discrimination claims. This allocation, previously set forth in the Title VII context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), was explained by the Court as follows:

> Once the plaintiff has met this initial burden [of demonstrating a prima facie case], the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* If the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. *St. Mary's Honor Center, supra*, at 509-510, and n. 3, 113 S.Ct., at 2748-1749, and n.3; *Texas Dept. of*

> *Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

O'Connor, 517 U.S. at 311; 116 S.Ct. at 1309.

In support of their motion for summary judgment, the defendants presented McCains' progress reports demonstrating "improvement needed" ratings and correspondence perpetuated during the evaluation process. The defendants also attached the civil service board's findings of fact wherein the board concluded that McCain's performance had not sufficiently improved in the areas found to be deficient in the evaluations and that his termination was for cause. Furthermore, the defendants presented the depositions of John Raines and Aros Mouton. Raines' deposition reveals a singular incident wherein he felt that McCain had made misrepresentations in order to obtain a secretary. In the excerpt of this deposition, Mouton's testimony reveals that he felt McCain's inability to get along with his superior, Raines, outweighed any of McCain's technical ability. We conclude the defendants' showing demonstrates the existence of legitimate reasons for McCain's dismissal.

Faced with similar evidence on amotion for summary judgment in *Stults*, 76 F.3d 651, the Fifth Circuit considered the defendants' demonstration in light of the presumption of discrimination discussed above. The court stated:

> In a discrimination case, the plaintiff's prima facie case creates a rebuttable presumption of discrimination that shifts the burden of production to the defendant to articulate a

legitimate, nondiscriminatory reason for the questioned employment action. *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503, 1505 (5th Cir. 1988). With its motion for summary judgment, Conoco submitted evaluations and termination reports regarding both Stults and Wallace that supported its claim that the plaintiffs wee terminated for performance deficiencies. In addition, Conoco submitted portions of relevant depositions that demonstrated the lack of evidence that its nondiscriminatory reasons were mere pretext or that its nondiscriminatory reasons were mere pretext or that its employment actions were actually motivated by age discrimination. Given this showing, we must agree with the district court that Conoco adequately demonstrated the absence of a material fact issue on the plaintiffs' age discrimination claims.

When the employer articulates a legitimate nondiscriminatory reason, and produces competent summary judgment evidence in support, as Conoco did in this case, *the presumption created by the prima facie case disappears and "the burden reverts to the plaintiff to prove that the employer's reason[] [is] pretextual"*. *Moore*, 990 F.2d at 815 (quoting *Normand v. Research Inst. of Am. Inc.* 927 F.2d 857, 859 (5th Cir. 1991). "The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the

> discharge." *Guthrie v. Tifco Industries*, 941 F.2d 374, 377 (5th Cir. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992).
>
> The plaintiff at all times retains the burden of persuading the trier of fact that impermissible discrimination motivated the adverse employment decision. *Bienkowski*, 851 F.2d at 1505....

Id. at 656-58 (emphasis added).

As the defendants satisfied the burden required to sustain the motion for summary judgment, the burden then shifts to McCain to demonstrate that any legitimate reason for dismissal was pretextual. *Stults*. 76 F.3d 651. In opposition to the motion for summary judgment, McCain submitted the deposition testimony of his superiors wherein they discussed reasons for this termination and reasons why demotion was not an option. Further, McCain submitted correspondence demonstrating difficulties in his working relationship with Raines. Neither the depositions nor the correspondence indicate that McCain was terminated due to his age. McCain did, however, present an excerpt from the deposition of his replacement, Tom Carroll, for the proposition that he was replaced by a younger person and the deposition testimony of Horace Rickey, an unsuccessful applicant for McCain's former position who was older than McCain. We do not conclude that this evidence is sufficient to create a genuine issue of material fact with regard to the motivation behind McCain's removal. In fact, due to the documented difficulty in the relationship between Raines and McCain, much of McCain's submission supports the defendants' assertion that

legitimate reasons existed for the City's action.

Although we have concluded that the lower court erred in some respects in finding no subject matter jurisdiction, we conclude that the motion for summary judgment was properly granted as the plaintiff failed to satisfy the requisite burden of establishing the existence of a genuine issue of material fact.

DECREE

For the foregoing reasons, the judgment of the lower court is affirmed. All costs of this appeal are assessed to the plaintiff, Howard McCain.

AFFIRMED

NUMBER 98-1902

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

HOWARD MITCHELL MCCAIN, JR.

Plaintiff-Appellant

VERSUS

THE CITY OF LAFAYETTE, ET AL

Defendants - Appellees

PETERS, J., concurring in part; dissenting in part.

I agree with the majority's opinion on every issue except that of the summary judgment. In my opinion, there are genuine issues of material fact which must be resolved by further trial proceedings. Thus, I would remand the matter to the trial court for further proceedings consistent with the other determinations of the majority opinion.

APPENDIX C

JUDGMENT

This matter came before this court on September 21, 1998, on a Motion for Summary Judgment filed by Defendants, with all parties represented by their respective counsel of record. Considering the memoranda, arguments, exhibits, and evidence submitted by counsel, and finding that there is no genuine issue as to material fact, and that Movers are entitled to judgment as a matter of law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by Defendants, the City of Lafayette, John R. Raines, Aros G. Mouton, and Kenneth F. Bowen, is granted, and that all claims and demands of Plaintiff, Howard M. McCain, are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs are assessed to Plaintiff, Howard M. McCain.

READ, RENDERED AND SIGNED in Lafayette, Louisiana, this 24th day of September, 1998.

Edward D. Rubin
District Judge

Supreme Court, U.S.
FILED
DEC 16 1999

No. 99-838

IN THE

Supreme Court of the United States

HOWARD MITCHELL McCAIN, JR.,

Petitioner,

v.

THE CITY OF LAFAYETTE, KENNETH BOWEN, AROS MOUTON and JOHN R. RAINES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Table of Appendices	x
Statement of the Case	1
Reasons for Denying the Writ	3
I. This Court Lacks Jurisdiction to Review the Louisiana Courts' Decisions, Since They are Based Solely Upon Louisiana Law.	3
II. The Individual Defendants Have Been Dismissed By Final Judgment From These Proceedings.	6
III. McCain Incorrectly Implies that Termination of an Employee When He is Close to Retirement Eligibility Constitutes Age Discrimination.	7
IV. McCain Misapplies the Decision of this Court in *O'Connor v. Consolidated Coin Caterers Corp.*	8
V. McCain Misstates the Experience Level of His Replacement and the Process by Which His Replacement was Selected.	10

Contents

Page

VI. McCain Misstates the Reasons for His Termination and for Refusal to Demote Him in Lieu of Termination. 11

VII. The Louisiana Courts Properly Stated and Applied Their Summary Judgment Rules in the Context of a State Law Age Discrimination Claim. 22

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982) 16

American Railway Express Co. v. Kentucky, 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639 (1927) 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 27

Barbe v. A.A. Harmon & Co., 705 So. 2d 1210 (La. App. 4th Cir. 1998), *writ denied*, 719 So. 2d 462 (La.) 24

Bennett v. Corroon and Black Corp., 517 So. 2d 1245 (La. App. 4th Cir. 1987), *writ denied*, 570 So. 2d 425 (La. 1988) 5

Bodenheimer v. P.P.G., 5 F.3d 995 (5th Cir. 1993) 24

Boyd v. State Farm, 158 F.3d 326 (5th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1357, __ L. Ed. 2d __, 67 USLW 3504 (April 5, 1999) .. 24

Bradley v. Harcourt, Brace and Co., 104 F.3d 267 (9th Cir. 1996) 28

Cited Authorities

	Page
Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107 (1930)	4
Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996)	28
Brown v. Vaughn, 589 So. 2d 63 (La. App. 1st Cir. 1981)	5
Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995), *cert. denied*, 516 U.S. 1078, 116 S. Ct. 785, 133 L. Ed. 2d 736 (1996)	28
Coll v. PB Diagnostic Systems, Inc., 50 F.3d 1115 (1st Cir. 1995)	29
Crabbs v. Copperweld Tubing Products Co., 114 F.3d 85 (6th Cir. 1997)	16
Dartez v. Atlas Assurance Co., 721 So. 2d 109 (La. App. 3d Cir. 1998)	23
Davis v. Board of Supervisors of Louisiana State University, 709 So. 2d 1030 (La. App. 4th Cir. 1998)	26
Deloach v. Delchamps, Inc., 897 F.2d 815 (5th Cir. 1990)	8

Cited Authorities

	Page
Dumas v. Angus Chemical Co., 742 So. 2d 655 (La. App. 2d Cir. 1999)	28
Duplessis v. Warren Petroleum, Inc., 672 So. 2d 1019 (La. App. 4th Cir. 1996)	5
Engle v. Isaac, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 783 (1982)	4
Hall v. Graphic Arts Union Local No. 3, 696 F.2d 494 (7th Cir. 1982)	29
Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996 (5th Cir. 1992)	29
Hayes v. Autin, 685 So. 2d 691 (La. App. 3d Cir. 1996), *writ denied*, 690 So. 2d 41 (La. 1997)	26
Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993)	7, 24
Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298 (7th Cir. 1990)	24
Jackson v. Belleau, 657 So. 2d 478 (La. App. 3rd Cir. 1995)	28
Kahn v. Pepsi Cola Bottling Group, 547 F. Supp. 736 (E.D.N.Y. 1982)	21

Cited Authorities

	Page
Kidd v. Taos Ski Valley, Inc., 88 F.3d 848 (10th Cir. 1996)	29
King v. Dunbar, 716 So. 2d 104 (La. App. 4th Cir. 1998), *affirmed in part, vacated in part on other grounds*, __ So. 2d __, 1999 WL 388160 (La., June 4, 1999) (No. 98-C-1805)	5, 6
Lawrence v. University of Texas Medical Branch at Galveston, 163 F.3d 309 (5th Cir. 1999)	24
LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018, 114 S. Ct. 1398, 128 L. Ed. 2d 72 (1994)	28
Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (8th Cir. 1992)	28
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)	27
McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)	9, 24
Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990)	29
Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201(1983)	6

Cited Authorities

	Page
Mitchel v. General Electric Co., 689 F.2d 877 (9th Cir. 1982)	29
Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir. 1993), *cert. denied*, 510 U.S. 976, 114 S. Ct. 467, 126 L. Ed. 2d 419	25
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996)	8, 9
Pinsonat v. J.E. Merit Constructors, Inc., 962 F. Supp. 848 (M.D. La. 1996)	5
Plaisance v. Travelers Ins. Co., 880 F. Supp. 798 (N.D. Ga. 1994), *affirmed*, 56 F.3d 1391 (11th Cir. 1995), *cert. denied*, 516 U.S. 931, 116 S. Ct. 338, 133 L. Ed. 2d 236 (1995)	29
Polk v. Pollard, 539 So. 2d 675 (La. App. 3rd Cir. 1989)	5
Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)	24
Proud v. Stone, 945 F.2d 796 (4th Cir. 1991)	28
Rand v. CF Industries, Inc., 42 F.3d 1139 (7th Cir. 1994)	28

Cited Authorities

Page

Rhodes v. Guilberson Oil Tools, Inc., 75 F.3d 989 (5th Cir. 1996) 24, 25

Robinson v. Benson Motor Co., 717 So. 2d 1252 (La. App. 5th Cir. 1998) 29

Shepard v. Bradford, 721 So. 2d 1049 (La. App. 3d Cir. 1998) 23

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) 9, 24

Stoute v. Long, 722 So. 2d 102 (La. App. 3d Cir. 1998) 23

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 24

Tolbert v. Fireman's Fund Ins. Co., 719 So. 2d 738 (La. App. 3d Cir. 1998) 23

Trujillo v. University of Colorado Health Sciences Center, 157 F.3d 1211 (10th Cir. 1998) 16

Vore v. Indiana Bell Tel. Co., 32 F.3d 1161 (7th Cir. 1994) 16

Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398 (1945) 5

Cited Authorities

	Page
Williams v. Vitro Services Corp., 144 F.3d 1438 (11th Cir. 1998)	28
Wilson v. International Business Machines Corp., 62 F.3d 237 (8th Cir. 1995)	29
Wynder v. Royal Ford Lincoln Mercury, Inc., 721 So. 2d 1001 (La. App. 3d Cir. 1998)	23
Statutes:	
29 U.S.C. § 621, *et seq.*	3
La. Code Civ. Proc. Art. 966(C)(2)	23
La. R.S. 23:311-312	3
La. R.S. 23: 971-972	3, 4, 5
United States Constitution:	
Fourteenth Amendment	3, 4
Rules:	
Fed. R. Civ. P. 56	28
United States Supreme Court Rule 10	6
Other Authorities:	
Section 11 of Lafayette Civil Service Act	11
Section 12(D) of Lafayette Civil Service Act (Acts 1958, No. 187)	10

TABLE OF APPENDICES

	Page
Appendix A — Petition For Damages Dated And Filed August 25, 1995	1a
Appendix B — Findings Of Fact From The Civil Service Hearings Of The Howard McCain Termination	11a

STATEMENT OF THE CASE

This is a state law age discrimination case filed by Howard M. McCain ("McCain") against his former employer, the City of Lafayette, Louisiana, as well as the former Mayor (Kenneth Bowen), Chief Administrative Officer (Aros Mouton), and Director of Public Works (John Raines) of the City of Lafayette.

McCain, a civil service employee, was terminated from his position as Capital Improvements Manager for the City of Lafayette on January 3, 1995, after an excruciating series of conflicts with his immediate supervisor, John Raines. In an equally excruciating proceeding, McCain appealed his discipline and termination to his civil service authority, the Lafayette Municipal Government Employees Civil Service Board. After extensive hearings on February 21, 1995, March 8, 1995, May 2, 1995, May 9, 1995, May 10, 1995, and May 22, 1995, this civil service board affirmed McCain's discipline and termination, specifically finding that the City of Lafayette terminated McCain "in good faith" and "for cause." (Appendix, Page 11a-16a). Throughout the entire course of McCain's protracted civil service appeal, he did not ever claim that his age was a motivating factor in his discipline or termination.

McCain failed to appeal the ruling of his civil service board affirming his termination, and that ruling became final on or about June 22, 1995.

On August 25, 1995, McCain filed a lawsuit contesting his discipline and termination in the Fifteenth Judicial District Court in Lafayette Parish, then claiming for the first time that he was disciplined and terminated because of his age.

On these facts, Judge Rubin of the Fifteenth Judicial District Court correctly granted a summary judgment motion filed by

Respondents. McCain's claims against Bowen, Mouton, and Raines were correctly dismissed on the ground that supervisors and co-employees are not personally liable for age discrimination claims as a matter of law. McCain's claims against the City of Lafayette were correctly dismissed due to McCain's failure to raise the issue of age discrimination until he reached the district court, after his adverse civil service board decision had become final. Judge Rubin correctly held that he had no subject matter jurisdiction to entertain McCain's age discrimination claim, since it arose directly out of McCain's discipline and termination. Judge Rubin also correctly held that McCain could not raise the issue of age discrimination in the district court when McCain had not first raised it in his civil service proceedings.

The City of Lafayette, Kenneth Bowen, Aros Mouton, and John Raines had also contended in their Motion for Summary Judgment that McCain failed, on the merits, to produce factual support to satisfy his evidentiary burden of proving elements of his case upon which he would bear the burden of proof at trial. Since Judge Rubin granted summary judgment on other grounds, he did not find it necessary to rule on this issue. However, the Third Circuit Court of Appeal did consider this issue and affirmed the district court's summary judgment on that basis. The Third Circuit also upheld the dismissal of all of McCain's claims against the individual defendants (Raines, Mouton, and Bowen), and McCain does not complain of this aspect of the Third Circuit opinion in his Petition before this Court.

McCain applied for a writ of certiorari from the Louisiana Supreme Court, which was denied on September 17, 1999. Thus, the last substantive decision on McCain's case comes from the Louisiana Third Circuit Court of Appeal.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction to Review the Louisiana Courts' Decisions, Since They are Based Solely Upon Louisiana Law.

McCain's Petition leaves this Court with the impression that his state court lawsuit was based upon an assertion of a federal claim, particularly the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. This is not so. McCain's claims were premised solely upon Louisiana state law, particularly La. R.S. 23: 971-972, as those statutes existed at the time of McCain's January 3, 1995 termination.[1]

McCain states in his Writ Application that he "filed a Petition for Damages under the Age Discrimination in Employment Act" (Petition, Page 2). He also states that "the jurisdiction of this court is a federal question" (Petition, Page 1), and states that the constitutional and statutory provisions involved in this matter include the Age Discrimination in Employment Act, 29 U.S.C.A. § 621, *et seq*., and the Fourteenth Amendment to the United States Constitution (Petition, Page 1). McCain further avers that this case should "be remanded for a merit trial on the Claimant's federally protected rights" (Petition, Page 25).

McCain did not assert that his termination was violative of the Age Discrimination in Employment Act or the Fourteenth Amendment. In all of the proceedings below, McCain has never made the slightest reference to the Fourteenth Amendment, and his Petition before this Court undertakes no explanation of the

1. The statutes upon which McCain brought suit, La. R.S. 23:971 and 23:972, were amended and redesignated in 1997 as La. R.S. 23:311-312, but any substantive changes embodied in that amendment have no application to McCain's January 3, 1995 termination.

basis of any Fourteenth Amendment claim. Respondents do not wish to speculate on the basis of any potential Fourteenth Amendment claim which could have been asserted or to make some effort to negate claims of McCain which are only mentioned but not discussed in any manner in his Petition. Respondents would note, however, that even if the decisions of the Louisiana state courts are incorrect, an erroneous decision on a question of state law does not give rise to a Fourteenth Amendment claim. *Engle v. Isaac*, 456 U.S. 107, 121 n.21, 102 S. Ct. 1558, 1568 n.21, 71 L. Ed. 783 (1982); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 680, 50 S. Ct. 451, 454, 74 L. Ed. 1107 (1930) (dictum); *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273, 47 S. Ct. 353, 355, 71 L. Ed. 639 (1927).

McCain removes all doubt in his own Petition for Damages filed in the state court proceedings as to whether he is making any effort to assert any federal claim. In Paragraph 3 of McCain's Petition for Damages filed in the 15th Judicial District Court, Lafayette Parish, Louisiana (Appendix, Page 2a), McCain specifically states that "this matter is brought under Louisiana law, and specifically, under the general provisions of L.S.A. - R.S. 23:971, *et seq.*" Referencing only these same provisions of state law, Paragraph 6 of McCain's Petition for Damages in the state court proceedings states that "your Petitioner's date of birth is August 5, 1935, thus making him categorized as an 'older person' as is defined in the Act described above as well as the jurisprudence interpreting the same." (Appendix, Page 3a). In Paragraph 20 of McCain's Petition for Damages, he states that "accordingly, your Petitioner brings this action under the provisions of L.S.A. - R.S. 23:971 seeking relief noted hereinafter." (Appendix, Page 6a). McCain also states in Paragraph 22 of his Petition for Damages that "the person who filled your Petitioner's former position as Public Works City Engineer was less qualified than your Petitioner and was a

'younger individual' as is read by both L.S.A. - R.S. 23:971 *et seq.* and the jurisprudence interpreting the same." (Appendix, Page 7a). In Paragraph 24 of McCain's Petition for Damages, he states that "it is prayed that under Section 971 *et seq.* your Petitioner is entitled to and prays for a trial by jury on all issues triable by civil jury herein." (Appendix, Page 9a).

Thus, contrary to the express statement of McCain in his Petition, no federal claim was asserted in his lawsuit. In a case such as this, in which it does not affirmatively appear from the record that a federal question was presented to the highest court of the state having jurisdiction and that its decision of a federal question was necessary to its determination of the cause, this Court does not undertake to review the case. *Williams v. Kaiser*, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398 (1945).

In the case before this Court, federal jurisprudence was used by Louisiana state courts only for the purpose of *guidance* on an interpretation of the Louisiana state statutory prohibition on age discrimination. Those federal cases do not necessarily compel the result reached by the Louisiana state courts. For example, the Louisiana Third Circuit Court of Appeal states in its opinion that "while the Plaintiff argues that the lower court should not have relied upon federal jurisprudence in interpreting a federal statute, related federal law is commonly used as *guidance* by courts of this state in interpreting discrimination statutes." (Petitioner's Appendix, Page 9a) (emphasis added). Louisiana jurisprudence is in accord. *Pinsonat v. J.E. Merit Constructors, Inc.*, 962 F. Supp. 848 (M.D. La. 1996); *Polk v. Pollard*, 539 So. 2d 675 (La. App. 3rd Cir. 1989); *Bennett v. Corroon and Black Corp.*, 517 So. 2d 1245 (La. App. 4th Cir. 1987), *writ denied*, 570 So. 2d 425 (La. 1988); *Brown v. Vaughn*, 589 So. 2d 63 (La. App. 1st Cir. 1981); *Duplessis v. Warren Petroleum, Inc.*, 672 So. 2d 1019 (La. App. 4th Cir. 1996); *King v. Dunbar*, 716 So. 2d 104

(La. App. 4th Cir. 1998), *affirmed in part, vacated in part on other grounds*, __ So. 2d __, 1999 WL 388160 (La., June 4, 1999) (No. 98-C-1805).

When, as here, a state court merely relies upon federal precedents for the purpose of guidance, and those precedents do not themselves compel the result that the court has reached, there are no federal grounds for this Court's review. *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201(1983).

For the foregoing reasons, it is clear that McCain's Petition presents only a request to review a state court's construction and application of state law. Though that state court may have looked to federal jurisprudence for *guidance*, such is insufficient to convert this case into a matter within this Court's jurisdiction. At a minimum, even if this Court has jurisdiction, such a case clearly does not present any of the considerations governing review on certiorari under Rule 10 of this Court.

II. The Individual Defendants Have Been Dismissed By Final Judgment From These Proceedings.

In the state court proceedings, the individual defendants, Kenneth Bowen, Aros Mouton, and John R. Raines, were dismissed from the proceedings on the grounds that as a matter of law, they could not be personally liable for the age discrimination alleged by McCain. *See* Petitioner's Appendix, Pages 6a-10a (opinion and decision of Louisiana Third Circuit Court of Appeal affirming district court's dismissal of individual defendants).

McCain did not complain of the dismissal of the individual defendants in his writ application to the Louisiana Supreme Court, nor does he complain of the dismissal of the individual defendants in his Petition before this Court. Accordingly, the judgment dismissing the individual defendants from McCain's

lawsuit is final. Because McCain styled his Petition to include Kenneth Bowen, Aros Mouton, and John Raines as respondents, those individual defendants bring this matter to the court's attention out of an abundance of caution and contend that the final judgment of the Louisiana state courts dismissing them from McCain's lawsuit is not now subject to reversal or modification.

III. McCain Incorrectly Implies that Termination of an Employee When He is Close to Retirement Eligibility Constitutes Age Discrimination.

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), this Court addressed a claim by a discharged employee that his discharge a few weeks before his pension was to vest constituted age discrimination. Faced with that claim, this Court held that:

> [A] decision by the company to fire an older employee solely because he . . . is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be ____") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and demigrating generalization about age, but would rather represent an accurate judgment about the employee — that he indeed is "close to vesting."

Hazen Paper, 507 U.S. at 612, 113 S. Ct. at 1707.

Of course, this Court in *Hazen Paper* did not mean to intimate that an employee could be fired in order to prevent his pension benefits from vesting. *Id.* Respondents deny that McCain's pension or retirement status played any factor whatsoever in its decision to terminate him. Respondents only bring *Hazen Paper* to the court's attention in this context to

demonstrate that McCain's statements in his Petition that he was "terminated within a few short months of retirement" (Petition, Page 2) and that "Howard McCain . . . was terminated within seven months of his slated retirement" (Petition, Pages 22-23) do not, without more, show age discrimination.

It is true that McCain was close to retirement eligibility when he was terminated, but the law does not require Respondents to give special treatment to McCain merely because he was close to attaining retirement eligibility. "The law does not require the defendants to grant any special treatment or favoritism to an employee because he is at least forty years of age." *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990) (approving jury instruction to this effect).

IV. McCain Misapplies the Decision of this Court in *O'Connor v. Consolidated Coin Caterers Corp.*

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), this Court stated that "because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell-Douglas prima facie case." *O'Connor*, 517 U.S. at 312, 116 S. Ct. at 1310.

In the instant case, McCain was replaced with someone over the age of forty, the decision makers in McCain's termination were over the age of forty, and the Mayor, the ultimate decision maker, was age sixty-nine, ten years older than McCain (Record, Pages 102, 115, 177, 183). However, Respondent, aware of the rule of *O'Connor*, did not contend in its Motion for Summary Judgment in the state court proceedings that McCain's replacement by someone over the age of forty barred his claim. In any event, *O'Connor* does not create any inference in favor of McCain; it only removes a prior bar to his claim.

O'Connor has no other real application to the instant case, except that both parties to the instant case, like the parties in *O'Connor*, have not contested the applicability of the analytical framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) to an age discrimination case. Like this Court's action in *O'Connor*, since the parties do not contest the applicability of the *McDonnell Douglas* framework, this Court should assume that it applies. *See O'Connor*, 517 U.S. at 311, 116 S. Ct. at 1310 ("[S]ince the parties do not contest that point, we shall assume it.") As noted in Point I, *supra*, although the Louisiana state courts were not compelled to utilize the *McDonnell Douglas* framework in their analysis of McCain's state law age discrimination claims, it is clear that they used the *McDonnell Douglas* framework (as further elucidated by *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)) as guidance in analyzing McCain's state law age discrimination claims.

McCain does not give any indication in his Petition as to how *O'Connor* was allegedly misapplied by the Louisiana state courts. In attempting to apply *O'Connor* to this case, McCain notes that an individual named Mitch Wyble, then 34 years of age, was appointed to the City Engineer position in lieu of McCain. It should be noted that the City Engineer position is not the position from which McCain was terminated — it is the position to which he claims he sought a demotion after his termination was recommended. McCain's actual replacement in the Capital Improvements Manager position was Tom Carroll, then 42 years of age. The appointment of Mitch Wyble to a position which McCain did not occupy at the time of his termination does not raise any inference of age discrimination whatsoever.

V. McCain Misstates the Experience Level of His Replacement and the Process by Which His Replacement was Selected.

McCain attempts to leave this Court with the false impression that his replacement, Tom Carroll, spent his entire career as an employee of the City of Lafayette behind McCain in the engineering hierarchy. In reality, Mr. Carroll spent three years as a hydraulic engineer with the Corps of Engineers, nine years as a project engineer with private firms in Lafayette, one year as a project engineer with a private firm in Florida, one year as a mathematics teacher and engineering consultant, and three years as a project engineer with a private firm in Lafayette all before his initial employment with the City of Lafayette in 1991 (Record, Pages 178-182).

In an apparent effort to indicate to the court that Mr. Carroll was not qualified to be appointed to McCain's former position, McCain conspicuously and conveniently ignores a seventeen-year span of Mr. Carroll's career from 1974-1991, when Mr. Carroll acquired all of the experience described in the preceding paragraph. As McCain admits in his Petition (*See* Petition, Page 21), when McCain was moved to the position of Capital Improvements Manager, Tom Carroll was promoted to McCain's former City Engineer position. Thus, when McCain was terminated, Mr. Carroll was a logical choice to be appointed to McCain's former position of Capital Improvements Manager.

McCain also makes an effort to indicate that another applicant for the job, who was 69 years old, should have been appointed to the job in lieu of Mr. Carroll. Mr. Carroll made a perfect score of "100" on his civil service examination, and the 69 year old applicant, Horace Rickey, scored five points higher, because he received extra credit for military service (Record, Page 194 [Section 12(D) of Lafayette Civil Service Act (Acts 1958, No. 187), providing for extra five points on

civil service exam for prior military service]; Record, Page 256 [deposition testimony of Horace Rickey admitting that he received five extra points for prior military service]). Despite McCain's repeated description of Mr. Rickey's experience as "vast," there is no indication whatsoever that the quality of Mr. Rickey's experience was superior in any way to Mr. Carroll. McCain produced no competent evidence from which any inference of age discrimination could be drawn from the appointment of Mr. Carroll, the person who had been next in line for McCain's position anyway, to McCain's former position.

Additionally, all of the positions at issue are civil service positions within the City of Lafayette, and Lafayette civil service laws require testing of applicants for a position, but they do not require that the person with the highest score be awarded the position. Any one of the top three highest-scoring applicants may be appointed (Record, Page 194 [Section 11 of Lafayette Civil Service Act, providing for selection process to this effect]). Therefore, the mere fact that Horace Rickey scored five points higher than Mr. Carroll on the civil service examination (with both applicants making a perfect score of "100," and the extra 5 points being awarded to Mr. Rickey for prior military service) also does not raise an inference of age discrimination when the 69-year-old Mayor did not appoint Mr. Rickey to the position.

VI. McCain Misstates the Reasons for His Termination and for Refusal to Demote Him in Lieu of Termination.

Howard M. McCain, Jr., was initially employed by the City of Lafayette in May of 1978 as a City Engineer by then-Mayor Kenneth Bowen. (Record, Page 99). In March, 1993, McCain was promoted to Capital Improvements Manager by Mayor Bowen. (Record, Page 100). John Raines was appointed Director of Public Works in April, 1993 by Mayor Bowen. (Record,

Page 104). Aros Mouton was Chief Administrative Officer for the City of Lafayette from February, 1992 to September, 1994. (Record, Page 116). After McCain was promoted to Capital Improvements Manager, his immediate supervisor was John Raines, and Mouton and Bowen, in turn, were Raines' supervisors.

Immediately after his appointment as Public Works Director, Raines began experiencing conflicts with McCain and problems with McCain's job performance. The first problem involved McCain's monopolization of a particular secretary whom McCain had moved away from the secretarial pool of the Public Works Department to the area near McCain's office. (Record, Pages 105, 106, 108). Raines directed McCain to move the secretary back to the secretarial pool. (Record, Page 107). Within two to three months of Raines' directive, the directive was finally carried out "reluctantly" by McCain. (Record, Page 110).

The following budget year, shortly after Raines advised McCain again that Raines would not budget a secretary that would be directly obliged to McCain, McCain went outside of the City's chain of command, spoke to Aros Mouton, and asked Mouton if McCain could include a secretary for himself in the upcoming Public Works Department budget. Mouton's reply was that if it was acceptable to Raines, it was acceptable to Mouton. (Record, Page 112). McCain falsely told Mouton that Raines had agreed to give McCain his own secretary if Mouton approved. (Record, Page 112). McCain then told Raines that Mouton didn't have a problem with the budgeting for the extra secretary for McCain. When Raines called Mouton to discuss the matter, Raines learned that McCain had falsely told Mouton that Raines had agreed to budget a secretary for McCain. (Record, Pages 112, 113).

Thus began a course of conduct on the part of McCain whereby he repeatedly failed or refused to comply with Raines' managerial directives. A complete and detailed description of McCain's insubordination and substandard performance appears in McCain's August 17, 1994 "Report of Performance Evaluation" which Raines prepared. (Record, Pages 119-129). The Performance Evaluation stated McCain's employment status as "improvement needed." (Record, Page 119). The following are selected examples of McCain's insubordination and substandard performance detailed in his August 17, 1994 "Report of Performance Evaluation."

A. Difficulty in completing work on schedule (Record, Page 120-121);

B. Failure to observe building "sign in" and "sign out" policies (Record, Page 121);

C. Failure to follow up with the City Auditor for amendments to a Capital Improvement Project (Record, Page 122);

D. Failure to correct problems in the monthly printout of the status of projects in the five year Capital Improvement Program (Record, Page 122);

E. Complaints and objections to preparation of the Engineering and Economic Feasibility Report (Record, Page 122-123);

F. Failure to inform the Public Works Operations and Maintenance Manager of a meeting because McCain did not like meeting with him (Record, Page 123);

G. Failure to pursue explanation and correction of a bill for legal services which appeared to be erroneous (Record, Page 123);

H. Failure to prepare for a meeting with a City Council Member about a Capital Improvement Project in the Council Member's district (Record, Page 123);

I. Failure to follow up, monitor, and coordinate a coulee project, nearly resulting in the loss of state funding for the project (Record, Page 123, 127);

J. Violation of chain of command by attempting to solicit approval from the Chief Administrative Officer on a new clerical position without Raines' prior knowledge or approval (Record, Page 124, 126-127);

K. Failure to follow up with negotiations on a proposed Multi Modal Transportation Center Project (Record, Page 124);

L. Condescending and rude attitude toward coworkers and supervisors (Record, Page 125);

M. Inability to handle new situations or changes in direction (Record, Page 125);

N. Lack of leadership and appropriate assumption of responsibility (Record, Page 125);

O. Unnecessarily questioning lines of authority and responsibility (Record, Page 126);

P. Violation of chain of command to attempt to procure an office chair and briefcase (Record, Page 127);

Q. Providing misleading information to Raines about whether McCain's subordinates had input in a proposed organizational change (Record, Page 127-128).

After the August 17, 1994 "Report of Performance Evaluation" was issued, McCain was placed on probation and was to be evaluated each month for three months. The intent of the probation process was to give McCain the opportunity

to demonstrate that he could perform his job functions. (Record, Page 118). As shown in each of McCain's special evaluations for October, November, and December, 1994 and in Raines' letter to McCain dated January 3, 1995, McCain's performance did not improve to an acceptable level. (Record, Pages 130-146). In the end, McCain's inability to get along with Raines, his supervisor, and do what he was instructed to do, far outweighed McCain's technical ability. (Record, Page 117).

On December 19, 1994, Mayor Bowen sent a letter to Howard McCain placing him on administrative leave with pay until a decision was made about his future employment status. (Record, Page 158).

On January 3, 1995, Raines sent a letter to McCain, which was approved by Mayor Bowen, which recommended that McCain be terminated effective January 3, 1995. (Record, Page 145).

As noted by the Louisiana Third Circuit Court of Appeals, McCain's own evidence produced in purported opposition to Respondents' Motion for Summary Judgment "supports the Defendants' assertion that legitimate reasons existed for the City's action." Petitioner's Appendix, Page 24a-25a. McCain contends that he disputed all of the examples of his substandard conduct and insubordination cited by Raines in his several performance appraisals of McCain, but that continued dispute only underscores Respondents' point. As the Louisiana Third Circuit Court of Appeals correctly found, the summary judgment record before the Louisiana courts patently demonstrated McCain's protracted and continuous resistance to Raines' supervisory authority and management style, which is a substantial part of the events which led to his termination.

The clear evidence of the personality conflict between Raines and McCain does not supply McCain with an age discrimination claim. *See Vore v. Indiana Bell Tel. Co.*, 32 F.3d 1161, 1162 (7th Cir. 1994); *Trujillo v. University of Colorado Health Sciences Center*, 157 F.3d 1211, 1214 (10th Cir. 1998). To the contrary, personality conflicts are a legitimate reason for discipline and discharge, particularly, as in this case, when a management level job is involved. *Crabbs v. Copperweld Tubing Products Co.*, 114 F.3d 85, 89 (6th Cir. 1997), *citing Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982).

With regard to the purported efficacy of a demotion of Howard McCain to his former City Engineer position, McCain misrepresents the record by omission of critical deposition testimony which he produced in his own opposition to Respondents' summary judgment motion. For example, the deposition testimony of John Raines, produced by McCain himself, included the following exchange:

> Q: Why couldn't Howard McCain take Mitch Wyble's job?
>
> A: That might have been an opportunity.
>
> Q: Do you have any reason why that shouldn't have happened?
>
> A: Well, two things. One, we had a discussion. The only thing that Mr. McCain offered was he was willing to accept a demotion down to the Engineer, City Engineer position. And the second thing is I have to decision [sic] whether I want — whether I'm firing someone — terminating someone because of their inability

> to perform work duties, to what degree am I confident that putting them in another position they'll be able to satisfy those work duties.

Record, Page 231.

The Chief Administrative Officer during part of the relevant time period, Aros Mouton, did not say that he believed that the demotion was "reasonable" (*see* assertion to the contrary in Petition at Page 22), he stated that he had no opinion on that specific question, but he would be concerned about whether a demoted employee could successfully function in his demoted position:

> A: . . . I think that his inability to seemingly get along with his supervisor, doing what he was instructed to do, far outweighed his technical ability, because of the fact that you never got to that point, you see.
>
> Q: Well, with that said, assume for me that there were problems as between him and his supervisor. If that's the case, OK, that is, if there's a problem between the Capital Improvements Manager and his supervisor, the Director of the Department of Public Works, what would be disadvantageous about taking that Capital Improvements Manager and sending him to his prior job as a City Engineer? Could you see anything?
>
> A: What would preclude him going back?
>
> Q: Why would it be disadvantageous?
>
> A: In my mind, that — people tend to work out, in management, those kinds of solutions in that

they're saying that, "Well, you can go back to your previous job." That has happened in some situations. I've even done it in some situations. I'm not too sure that that was not — opportunity was not afforded Howard even before he was off probation. I'm not sure if that happened or didn't happen, because I was gone. I think that it may — and I'm not — I don't know — if it was offered, I don't know who offered it to him.

Q: Would you find such an offering to be appropriate?

A: You'd have to look at the circumstances as to what — whether or not he would have the ability based upon his inability to function at the level that he was functioning, whether or not he could go back to that position and function with — with the kind of desire and the kind of work ethic that would need to be done to get the job done, because of the fact that he had been demoted back down to that level. You see, you have to look at that whether — you have to look at that to see, would that be able to work, and are you creating even a bigger monster than what you had before you demoted him?

Q: And the only way you figure that out is by demoting and seeing how they function, correct?

A: Well, no.

Q: OK.

A: You can draw some conclusions from behavior that you can say, "Well, he did OK here. He didn't do OK there," but I don't know what all the circumstances presented itself as to why they did not give him that opportunity. . . .

* * *

Q: I see. So, basically, because you weren't, you don't have an opinion as to whether he should have been afforded that, correct?

A: I don't have an opinion?

Q: Correct. If you do, let me know.

A: Well, I'm saying there are other — I can't have an opinion, because I don't know the other circumstances. . . .

Record, Pages 233-236.

Most importantly, McCain omitted a critical passage from the deposition testimony of Kenneth Mouton which specifically demonstrates the legitimate business reason why McCain was not demoted to another position within the same department with the same supervisor:

Q: Who did you make that pitch or recommendation to?

A: Mr. Raines and the Mayor.

Q: Did Mr. Raines address to you why he would not accept your recommendation?

A: Yes.

Q: What did he say?

A: Basically, he said that, I guess, the traits and the — how did he put it? The traits and the same things that Mr. McCain was deficient in as CID Manager, he would have to use those same traits and whatever as the Engineer, that specific engineer, and he would be in the same boat he was in at the present time — at the time. That's basically what he said.

Record, Page 245.

In the final analysis, the most telling deposition testimony, produced by McCain himself in opposition to Respondents' summary judgment motion, came from the Mayor of the City of Lafayette, the 69-year-old ultimate decision maker, who made the final decision to terminate McCain:

A: He refused to do what John, his supervisor, was directing him to do. Now, you put that in a structure of a department with multiple division heads and one of them does that, you just as soon shut the works down, because one recalcitrant says to the boss, "Hell with you, I am not going to do it." And that is the position — this man, hardhead from Mississippi, he just wouldn't do it. And he made quite clear what he intended that he wasn't going to do. And, you know, as a friend, $40,000.00 is a lot of money for me to leave on the table just to win an argument. . . .

* * *

Q: . . . And that was the important thing, is to preserve the integrity of John Raines' work as Department of Public Works?

A: It reached the point where something had to be done. It was demoralizing and destroying infrastructure for management. And, believe me, we were no example of infrastructure, but the employees were dragged into it, you know. . . .

* * *

Q: It had to do with him getting along with John Raines?

A: That was it and arguing and he ain't — what is the old saying? The boss is not always right, but he is always the boss.

Record, Pages 238 - 240.

The fact that McCain performed satisfactorily in a prior job, even if the prior job had some similar duties, does not show age discrimination when he is terminated from his current job for unsatisfactory performance. *See Kahn v. Pepsi Cola Bottling Group*, 547 F. Supp. 736 (E.D.N.Y. 1982). Respondents disciplined McCain and recommended his termination for legitimate business reasons, and there is no evidence whatsoever (and substantial evidence to the contrary) that a demotion would cure the legitimate business reasons which put McCain in his predicament of being slated for termination. McCain produced nothing in response to the City's substantial evidence of legitimate business reasons, other than his own opinions of the reason for his discipline and termination. It is well established that such self-serving opinions are insufficient to successfully overcome a motion for summary judgment. *See* Point VII, *infra*.

VII. The Louisiana Courts Properly Stated and Applied Their Summary Judgment Rules in the Context of a State Law Age Discrimination Claim.

The Louisiana Third Circuit Court of Appeals concluded that the evidence presented by McCain was insufficient to create a genuine issue of material fact on the issue of McCain's age as a motivation for his termination. The Third Circuit specifically found that there was "documented difficulty in the relationship between Raines and McCain," and that McCain himself submitted evidence that supported the defendants' assertion that "legitimate reasons existed for the City's action." (Petitioner's Appendix, Pages 24a-25a).

In granting Respondents' Motion for Summary Judgment, the Louisiana district court did not find it necessary to rule upon all of the grounds asserted by Respondents in support of their Motion. Respondents' Motion for Summary Judgment was initially granted upon McCain's failure to prevail in his civil service board proceedings, his failure to appeal the adverse result of his civil service proceedings, and his failure to raise the issue of age discrimination in his civil service proceedings. The Third Circuit affirmed the district court's grant of summary judgment on other grounds presented by Respondents to the district court but not relied upon by the district court.

In the district court proceedings, Respondents specifically asserted that McCain could not produce factual support sufficient to establish that the actual reason for his discipline and discharge was age discrimination. The district court did not find it necessary to rule on this issue, because summary judgment was granted on different grounds. However, it is well established under Louisiana summary judgment jurisprudence that a Louisiana Court of Appeal reviews summary judgment proceedings *de novo* under the same considerations which govern the Louisiana district court's consideration of summary

judgment motions. *Stoute v. Long*, 722 So. 2d 102 (La. App. 3d Cir. 1998); *Shepard v. Bradford*, 721 So. 2d 1049 (La. App. 3d Cir. 1998); *Dartez v. Atlas Assurance Co.*, 721 So. 2d 109 (La. App. 3d Cir. 1998); *Wynder v. Royal Ford Lincoln Mercury, Inc.*, 721 So. 2d 1001 (La. App. 3d Cir. 1998); *Tolbert v. Fireman's Fund Ins. Co.*, 719 So. 2d 738 (La. App. 3d Cir. 1998). In this case, the Louisiana Third Circuit reached a correct result by affirming the district court's summary judgment *de novo* on the additional grounds which were asserted by Respondents but not utilized by the district court.

Under the 1997 amendments to the Louisiana summary judgment rules, Respondents need not have negated every element of McCain's claim in order to establish their entitlement to summary judgment. Respondents were entitled to summary judgment by "point[ing] out to the court that there is an absence of factual support for one or more elements essential to [McCain's] claim" and McCain's subsequent failure "to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial." La. Code Civ. Proc. Art. 966(C)(2). In this case, after three years of discovery, McCain presented no factual support to satisfy his evidentiary burden of proving the most important element of his case — that his age played some part in his termination.

As discussed in Point I, *supra*, McCain's age discrimination claim is rooted solely in state law, but Louisiana courts have looked to the interpretive jurisprudence of the federal counterparts of these statutes for guidance. Utilizing the guidance of federal jurisprudence, the Louisiana Third Circuit Court of Appeal held that McCain's state law age discrimination claim failed because Respondents showed legitimate business reasons for McCain's discharge, and McCain failed to show that these legitimate business reasons were a pretext and that age discrimination was the real reason for McCain's discharge.

See Petitioner's Appendix, Pages 20a-25a; *See also McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Rhodes v. Guilberson Oil Tools, Inc.*, 75 F.3d 989 (5th Cir. 1996) (*en banc*); *Bodenheimer v. P.P.G.*, 5 F.3d 995 (5th Cir. 1993).

In the state court proceedings, Respondents clearly tendered one or more legitimate business reasons for McCain's discipline and discharge by producing substantial evidence of McCain's insubordinate conduct and substandard performance. Thereafter, the burden fell to McCain to *prove* that Respondents' proffered, age-neutral reasons are pretext, *and* that intentional age discrimination was the real reason for McCain's discharge. McCain properly did not survive a summary judgment motion for failing to do so. *See Bodenheimer, supra*, 5 F.3d at 957; *Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309 (5th Cir. 1999); *Boyd v. State Farm*, 158 F.3d 326 (5th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1357, __ L. Ed. 2d __, 67 USLW 3504, 3531, 3610, 3613 (April 5, 1999).

McCain's age discrimination claim cannot succeed unless he *proves* that his age "actually . . . had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L. Ed. 2d 338 (1993). Under the Louisiana law at issue in this case, in order for age to be a determinative factor in McCain's discharge, it is necessary that McCain prove that his discharge would not have occurred if he had been younger. *Barbe v. A.A. Harmon & Co.*, 705 So. 2d 1210 (La. App. 4th Cir. 1998), *writ denied*, 719 So. 2d 462 (La.), *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), *and citing Holzman v. Jaymar-Ruby, Inc.*, 916 F.2d 1298 (7th Cir. 1990).

In this case, McCain's immediate supervisor, John Raines, gave him an unsatisfactory yearly evaluation and explained all the reasons for the unsatisfactory rating in minute detail. Throughout the course of three years of discovery, McCain produced no evidence that the facts relied upon by Raines in giving the unsatisfactory ratings were false, and more importantly, McCain has produced no evidence that the true reason for the unsatisfactory ratings or the discharge was McCain's age.

"If age does not motivate the employer's decision, then a discharge may well be unfair or even unlawful yet not be evidence of age bias. . . ." *Rhodes v. Guilberson Oil Tools, Inc., supra*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*), *quoting Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir. 1993), *cert. denied*, 510 U.S. 976, 114 S. Ct. 467, 126 L. Ed. 2d 419. Quite simply, McCain has devoted much effort and rhetoric toward an attempt to portray his termination as unfair or unreasonable, but he has not produced one shred of evidence which indicates that age motivated the decision to terminate him. Further, McCain has already pursued the issue of whether his termination was unfair or unreasonable in proceedings before the Lafayette Municipal Government Employees Civil Service Board, and that Board specifically found that Respondents acted in "good faith" and that "cause" existed for McCain's termination (Appendix, Pages 11a-16a). The adverse findings of this independent board, specifically designed for the protection of Civil Service employees like McCain, only further weakens any supposed inference of age discrimination which McCain may attempt to assert.[2]

2. In the state court proceedings, Respondents argued that the Civil Service Board decision adverse to McCain (Appendix, Pages 11a-16a) was the "law of the case" on the issue of the existence of legitimate business reasons for McCain's discharge. Because the Louisiana state courts decided this case on other grounds, those courts did not reach this issue.

If McCain believed that age discrimination was a motivating factor in his termination, no one could discern that belief from McCain's conduct in the civil service proceedings. Not only did McCain fail to appeal the finding of the Municipal Government Employees' Civil Service Board finding "good faith" and "cause" for his termination; McCain failed to raise the issue of age discrimination in those proceedings, and that conspicuous silence illuminates McCain's own motivations. If McCain truly believed that age was a motivating factor in his termination, surely McCain would have at least mentioned that belief in his civil service proceedings.

McCain argues, only in passing in the last paragraph of his Petition, that this Court's jurisprudence governing summary judgment proceedings in the federal courts was violated by the state courts' grant of summary judgment. As demonstrated in Point I, *supra*, this is an age discrimination lawsuit brought under state law in a state court. As such, federal jurisprudence governing summary judgment in the federal courts does not apply of its own accord.

Nevertheless, much of the rationale of this Court in analyzing summary judgments under the Federal Rules of Civil Procedure has been adopted by Louisiana courts in analyzing summary judgments under the Louisiana Code of Civil Procedure. *See, e.g., Hayes v. Autin*, 685 So. 2d 691 (La. App. 3d Cir. 1996), *writ denied*, 690 So. 2d 41 (La. 1997); *Davis v. Board of Supervisors of Louisiana State University*, 709 So. 2d 1030 (La. App. 4th Cir. 1998). Respondent brings this to the Court's attention only to point out that McCain does not convert this state law issue into a federal issue merely because Louisiana law parallels federal law on the issue of the propriety of summary judgment.

Even under the standards articulated by this Court for the grant of summary judgments in the federal courts, McCain's

purported countervailing evidence fails. After Respondents articulated legitimate, age-neutral business reasons for McCain's discipline and discharge, McCain offered nothing in support of his contentions other than his own opinion that Respondents' actions were motivated by his age. "When the moving party has carried its burden under Rule 56(c) [of the Federal Rules of Civil Procedure], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

This Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) further expanded upon the *Matsushita* standard by specifically allowing the trial court to assess the *quality* of the nonmovant's evidence in summary judgment proceedings, noting that the trial court "must bear in mind the actual quantum and quality of proof necessary to support liability. . . ." *Anderson*, 477 U.S. at 254, 106 S. Ct. at 2513. No genuine issue of material fact exists if the opposing party's opposition materials are "of insufficient caliber or quantity" to allow a rational jury to decide for the nonmovant. *Id.*

To determine the "caliber or quantity" of McCain's opposition materials in this case, *Matsushita* also allows for the weighing of inferences to be drawn from the facts, in terms of the reasonableness or persuasiveness of those inferences. In *Matsushita*, the nonmovant was required to show that the inferences nonmovant argued from the facts were "reasonable in light of the competing inferences." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356.

In this case, McCain was hired and terminated by the same person — Mayor Kenneth Bowen. Not only was Mayor Bowen 69 years old at the time he terminated McCain; an inference of

nondiscrimination arose when McCain was hired and terminated by the same person, and/or when he was promoted to the Capital Improvements Manager position by Mayor Bowen and discharged from that position by Mayor Bowen within a relatively short time frame. *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018, 114 S. Ct. 1398, 128 L. Ed. 2d 72 (1994); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995), *cert. denied*, 516 U.S. 1078, 116 S. Ct. 785, 133 L. Ed. 2d 736 (1996); *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992); *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267 (9th Cir. 1996); *Williams v. Vitro Services Corp.*, 144 F.3d 1438 (11th Cir. 1998). "The fact that the actor involved in both employment decisions is also a member of the protected class only enhances the inference." *Brown v. CSC Logic, Inc.*, *supra*, 82 F.3d at 658, *citing LeBlanc v. Great American Ins. Co.*, *supra*, 6 F.3d at 847.

Given this inference of nondiscrimination, along with the inferences which arise from the adverse ruling of McCain's civil service board and the legitimate business reasons articulated by Respondents, McCain's purported countervailing evidence does not even raise a "competing" inference. McCain's own conclusory allegations that particular actions were motivated by his age are clearly insufficient to overcome summary judgment under Louisiana law (particularly Article 966-967 of the Louisiana Code of Civil Procedure) and under federal law (particularly Rule 56 of the Federal Rules of Civil Procedure). *See, e.g., Dumas v. Angus Chemical Co.*, 742 So. 2d 655 (La. App. 2d Cir. 1999) (Louisiana law); *Jackson v. Belleau*, 657 So. 2d 478 (La. App. 3rd Cir. 1995) (Louisiana law; ultimate facts and conclusions of law are not to be

considered in summary judgment proceedings); *Robinson v. Benson Motor Co.*, 717 So. 2d 1252 (La. App. 5th Cir. 1998) (Louisiana law; nonmovant's conclusory affidavit as to movant's intent held insufficient); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Coll v. PB Diagnostic Systems, Inc.*, 50 F.3d 1115 (1st Cir. 1995); *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996 (5th Cir. 1992); *Hall v. Graphic Arts Union Local No. 3*, 696 F.2d 494 (7th Cir. 1982); *Wilson v. International Business Machines Corp.*, 62 F.3d 237 (8th Cir. 1995); *Mitchel v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982); *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848 (10th Cir. 1996); *Plaisance v. Travelers Ins. Co.*, 880 F. Supp. 798 (N.D. Ga. 1994), *affirmed*, 56 F.3d 1391 (11th Cir. 1995), *cert. denied*, 516 U.S. 931, 116 S. Ct. 338, 133 L. Ed. 2d 236 (1995).

In sum, a review of McCain's Petition reveals that he merely seeks review of a "garden variety" summary judgment granted against him under well-settled principles of Louisiana law. There is nothing novel or suspect about the decisions of the Louisiana state courts adverse to McCain, and McCain has offered nothing in support of his contentions other than his own speculation and conjecture.

CONCLUSION

For the reasons stated hereinabove, McCain's Petition for Writ of Certiorari should be denied by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — PETITION FOR DAMAGES DATED AND FILED AUGUST 25, 1995

15TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 953770-2A

LAFAYETTE PARISH, LOUISIANA

HOWARD MITCHELL MCCAIN, JR.

VERSUS

THE CITY OF LAFAYETTE, KENNETH BOWEN, AROS MOUTON AND JOHN R. RAINES

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes **HOWARD MITCHELL MCCAIN, JR.**, a resident of the full age of majority and domiciled in Lafayette Parish, Louisiana, who respectfully represents:

1.

Sought to be made defendants herein are the following:

(A) **THE CITY OF LAFAYETTE**, a public entity chartered and incorporated under the Constitution of Louisiana of 1974, and domiciled in Lafayette Parish, Louisiana;

(B) **KENNETH BOWEN**, a resident of the full age of majority and domiciled in Lafayette Parish, Louisiana;

(C) **AROS MOUTON**, a resident of the full age of majority and domiciled in Lafayette Parish, Louisiana;

(D) **JOHN R. RAINES**, a resident of the full age of majority and domiciled in Lafayette Parish, Louisiana.

2.

It is respectfully submitted that the cumulative claims brought against the defendants herein are in excess of $50,000.00, thus warranting a trial by jury on any issue triable by civil jury.

3.

This matter is brought under Louisiana Law, and specifically, under the general provisions of LSA-R.S. 23:971, et seq.

4.

This Honorable Court is an appropriate jurisdiction under the provisions of LSA-C.C.P. Article 42, LSA-C.C.P. Article 74, and LSA-C.C.P. Article 84.

Appendix A

5.

Your petitioner is a citizen of the State of Louisiana, whose social security number is 427-52-3535.

6.

Your petitioner's date of birth is August 5, 1935, thus making him categorized as an "older person" as is defined in the Act described above as well as the jurisprudence interpreting the same.

7.

Your petitioner has an educational background including a high school diploma, military experience with the Army Corps of Engineers, two Bachelor's of Science Degrees, and is a licensed Civil Engineer, Environmental Engineer and Land Surveyor in the State of Louisiana.

8.

Your petitioner had a wealth of employment experience in a variety of fields making him an attractive asset to the City of Lafayette's engineering programs.

9.

On May 28, 1978, your petitioner accepted employment with the City of Lafayette in the position of Public Works City Engineer. Thereafter, your petitioner performed satisfactorily in that position for nearly fifteen years, or until March 8, 1993.

Appendix A

10.

At that time, though your petitioner did not actively solicit the position, your petitioner was literally promoted by the executive office of the City of Lafayette from his satisfactory position of Public Works City Engineer to the position of Capital Improvements Manager.

11.

Though City official policy would require otherwise, an evaluation was done of petitioner's annual performance on August 5, 1994, thus covering a period of time more extensive than the guidelines provided for within City policy.

12.

Prior to the rendition of this abhorrent evaluation, the City Chief Administrative Officer, Aros Mouton, directed an inter office memo to your petitioner's direct supervisor, John R. Raines, the Director of Public Works to "review with him" [your petitioner] and to "fire Howard McCain", which said note was directed on July 7, 1994, a date prior to any review or determination of performance.

13.

Thereafter, as self-serving as it was, a report was issued on August 5, 1994 in the form of an annual evaluation. In that evaluation, "improvement needed" was noted as the status of performance. Thus, in keeping with City policy, the "improvement needed" status required a monthly evaluation for three months following the rendition of this evaluation.

Appendix A

14.

Not surprisingly, four evaluations were done without the notation of satisfactory performance.

15.

At no point prior to the issuance of the memo by Aros Mouton to John Raines in his near seventeen years of performance with the City of Lafayette did your petitioner receive anything less than a satisfactory rating as an employee.

16.

After the rendition of successive unsatisfactory evaluations in the months following the note from Aros Mouton, your petitioner was ultimately recommended for termination by John Raines. At that time, and on December 16, 1994, your petitioner was placed on administrative leave pending the decision of the City executive as to his termination.

17.

At this time, your petitioner expressed to the City executive his willingness and desire to return to the still available position that he held as Public Works City Engineer. Though your petitioner acknowledged that such a transfer would be a demotion, it was an acceptable demotion given the years of service he had with the City of Lafayette as well as accrued benefits including sick leave, vacation, income and, not the least of which, his retirement program.

Appendix A

18.

Despite communicating his desire to the executive office of the City of Lafayette, your petitioner was nevertheless hand delivered a termination indicating that Mayor Bowen and John Raines had terminated your petitioner effective January 3, 1995.

19.

Your petitioner has exhausted his civil service remedies without avail.

20.

Accordingly, your petitioner brings this action under the provisions of LSA-R.S. 23:971 seeking relief noted hereinafter.

21.

It is respectfully submitted that the City of Lafayette discriminated against your petitioner based on his age.

22.

In furtherance of this, your petitioner established a prima facie case by demonstrating that his position as Capital Improvements Manager was filled by a younger individual who was less qualified than your petitioner. Furthermore, your petitioner demonstrates that his position which was vacant as of the time of his termination as a Public Works

City Engineer was filled by a younger individual, though the City of Lafayette had always remarked that your petitioner's work was "satisfactory". Furthermore, the person who filled your petitioner's former position as Public Works City Engineer was less qualified than your petitioner and was a "younger individual" as is read by both LSA-R.S. 23:971, et seq. and the jurisprudence interpreting the same.

23.

As a consequence of the discrimination of your petitioner, your petitioner has sustained physical losses and general damages including, but not limited to the following:

(A) A loss of accrued sick leave pay with the City of Lafayette;

(B) A loss of accrued vacation time with the City of Lafayette;

(C) A loss of beneficial health insurance afforded by the City of Lafayette;

(D) A deferment of retirement income which would have been realized by your petitioner;

(E) A loss of attribution to the retirement program for the City of Lafayette, which would have necessarily resulted in a greater rate of retirement had your petitioner been permitted to remain in his position that he performed satisfactorily;

Appendix A

(F) A loss of business reputation and good will as a professional;

(G) General damages including:

(1) Mental Anguish in the past

(2) Mental anguish in the present

(3) Mental anguish which your petitioner expects that he will endure in the future

(4) Adverse health problems associated with mental stress in the past, present and future including an adverse consequence to your petitioner's circulatory system and metabolism system and an exacerbation of pre-existing diabetic symptoms which has required medical attention, the incurring of medical bills in the past, present and future

(5) Mental and physical pain and suffering in the past, present and future

(H) A loss of pepsco indemnity

(I) Other liquidated and general damages to be more fully shown at the trial of this matter.

Appendix A

24.

Furthermore, your petitioner has had to retain the services of undersigned counsel. Accordingly, it is prayed that under Section 971, et seq., your petitioner is entitled to and prays for a trial by jury on all issues triable by civil jury herein.

25.

Because of the concerted effort between Mayor Kenneth Bowen, Aros Mouton and John R. Raines, all acting out of intent and in violent disregard for the rights of your petitioner, it is prayed that a judgment be assessed individually against the three actors in this matter as well as an assessment of punitive damages associated with the intent to discriminate and damages thereby caused.

Wherefore, premises considered, **HOWARD MITCHELL MCCAIN, JR.** prays that this Petition for Damages be filed into the record. Let the City of Lafayette, Mayor Kenneth Bowen, Administrator Aros Mouton and Chief John R. Raines be served and cited to appear and answer the same, and after the lapse of all legal delays and due proceedings are had, there be a judgment in favor of your petitioner and against the defendants in an amount reasonable under the premises, together with judicial interest from the date of demand until paid, an assessment of all court costs, an assessment of attorney's fees, and an assessment of punitive damages appropriate under the circumstances.

It is further prayed that your petitioner be granted a trial by jury on all issues triable by civil jury herein.

Appendix A

AND FOR ALL GENERAL & EQUITABLE RELIEF, ETC.

Respectfully Submitted:

s/ R. Scott Iles
R. SCOTT ILES #19936
P. O. Box 3385
Lafayette, LA 70502
318/234-8800

PLEASE SERVE:

THE CITY OF LAFAYETTE
through its Mayor, Kenneth Bowen
705 West University
Lafayette, LA 70506

MAYOR KENNETH BOWEN
at his place of employment,
705 West University
Lafayette, LA 70506

AROS MOUTON
at his place of employment,
705 West University
Lafayette, LA 70506

JOHN R. RAINES
at his place of employment,
705 West University
Lafayette, LA 70506

APPENDIX B — FINDINGS OF FACT FROM THE CIVIL SERVICE HEARINGS OF THE HOWARD McCAIN TERMINATION

CITY OF LAFAYETTE

FINDINGS OF FACTS

Howard McCain
vs.
City of Lafayette

On February 21, March 8, May 2, May 9, May 10, and May 22, 1995 public Civil Service Hearings of the Howard McCain termination were held with the following board members present:

February 21, 1995

PRESENT: Leroy Broussard, Jr., Mary Broussard, Jelena Bertrand, and Buddy Guidry

ABSENT: Carroll Baudoin

March 8, 1995

PRESENT: Leroy Broussard, Jr., Jelena Bertrand, and Buddy Guidry

ABSENT: Carroll Baudoin and Mary Broussard

NOTE: Mr. Baudoin indicated he would not participate in the remaining hearings because of his absence from the first one. It was his opinion that his future participation would be unfair to Mr. McCain.

Appendix B

NOTE: Mary Broussard listened to the tape of this meeting.

May 2, 1995

PRESENT: Leroy Broussard, Jr., Jelena Bertrand, and Buddy Guidry

ABSENT: Carroll Baudoin and Mary Broussard

NOTE: Mary Broussard listened to the tape of this meeting.

May 9, 1995

PRESENT: Leroy Broussard, Jr., Mary Broussard, Jelena Bertrand, and Buddy Guidry

ABSENT: Carroll Baudoin

May 10, 1995

PRESENT: Leroy Broussard, Jr., Mary Broussard, Jelena Bertrand, and Buddy Guidry

ABSENT: Carroll Baudoin

May 22, 1995

PRESENT: Leroy Broussard, Jr., Mary Broussard, Jelena Bertrand, and Buddy Guidry

ABSENT: Carroll Baudoin

Appendix B

Both the defendant, representing himself, and the appointing authority through their attorney, Wayne Shullaw, were allowed sufficient opportunity to present evidence through testimony and exhibits supporting their positions. The following witnesses were called and testified: Aros Mouton, Marvin Leonard, James Pollock, Joe Lasseigne, John Raines, Floyd Domingue, Vernon Roger, Terry Cordick, Tom Carroll, Sarah Harper, George Lewis, Becky Fontenot, Ronald Keddy, William Frank, Ken Mouton, Horace Rickey, Steve Trumps, Pearly Brown, Karl Schexnayder, Debra Boutin, Dorothy Dillon, Gary Gauthier, Lucius Broussard, and Howard McCain. At the conclusion of the hearing the members of the Board voted unanimously to go into executive session.

Upon reconvening the hearing the following statement was made by Chairman Leroy Broussard.

> After reviewing the testimony and the exhibits presented by both parties, the Board has reached the following conclusion in this case:
>
> Mr. McCain's May 29, 1993 to May 29, 1994 evaluation of overall Improvement Needed was justified by the following:
>
> Mr. McCain correctly delegated work to subordinates, however, he also attempted to abdicate the accountability for the responsibility of his position.
>
> Mr. McCain failed to show satisfactory supervisory judgment in his assignment of work and his leadership

of subordinates as evidenced by his reassignment of the GSU right of way acquisition to the Chief Right of Way Agent who had already acknowledged his inability to accomplish the task assigned and other similar occurrences.

There was insubordination towards the Public Works Director per the following actions: 1) Failure to follow direct orders of the Public Works Director to entirely relocate the clerical staff within the stated time limit; 2) Oral and written communications directly with the CAO and Mayor after being specifically instructed not to by the Public Works Director.

Mr. McCain repeatedly failed to meet deadlines designated to his supervisor and acknowledged no responsibility for the lateness of various projects which adversely affected other projects.

Mr. McCain's personal relationships with fellow employees and the public delayed the budget operations of the City Council and also caused additional work for other divisions and other departments. Specifically, the delay was the failure to do a budget revision for more than two years, which resulted in a written citation by the City Auditor in the audit management report.

His overall performance during this period showed that he was not willing to adapt his management style to one that met with his supervisor demanded.

Appendix B

Based on these findings, Mr. McCain was properly placed on special evaluation for a period of ninety days.

Board conclusions in regard to the Special Evaluation period of September 16, 1994, to December 16, 1994 are as follows:

1. In general, Mr. McCain's improvement in the deficient areas found by the Board during his Annual Evaluation from May 29, 1993, to May 29, 1994, was not sufficient to change his overall evaluation.

2. Some of the reports prepared under the direction of Mr. McCain and submitted to the City Council continued to be inaccurate. A prime example was the Feasibility Report of October 3, 1994, and the recommended Capital Outlay Report dated September 26, 1994.

3. Inaccuracies in his work were exhibited during this Special Evaluation period by Mr. McCain. Two instances are November 8, 1994, two errors were discovered in agenda items prepared by the Capital Improvements Division. Secondly, he incorrectly stated that monies wee available in the FY 1994/95 proposed Street Bond Sale which were, in fact, found not available in the Drainage Bond portion which was to be the subject of a general election.

Therefore, in consideration of the testimony and exhibits submitted the Board finds that Mr. McCain did not improve to a degree that justifies changing his evaluation from Improvement Needed to a Satisfactory status.

Appendix B

Chairman Broussard then entertained a motion from board members.

The following motion was made by Charles Guidry:

> Because of his failure to improve to a satisfactory level the City had just cause for taking disciplinary action. After lengthy and careful deliberation the Board finds that the City acted in good faith and with just cause in the termination of Mr. McCain.

This motion was seconded by Jelena Bertrand and carried unanimously.

s/ Lee S Eilers
Lee S. Eilers
Director of Personnel

s/ Donna Picard
Donna Picard
Witness